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DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF PROPOSED RULEMAKING

MAR NOTICE NO. 2025-98.1

Summary

Amendment of ARM 37.86.2901 and 37.86.2907 pertaining to inpatient rehabilitation facilities

Hearing Date and Time

Thursday, May 15, 2025, at 9:00 a.m.

Virtual Hearing Information

Join Zoom Meeting at: <https://mt-gov.zoom.us/j/89311957068pwd=UVKqbbeDSAbgBg5TTnofMLdQm0PhcU.1>

meeting ID: 893 1195 7068, and password: 374079

Dial by telephone: +1 646 558 8656, meeting ID: 893 1195 7068, and password: 374079.

Find your local number: <https://mt-gov.zoom.us/u/kcOVXcXh0b>.

Comments

Comments may be submitted using the contact information below. Comments must be received by Friday, May 23, 2025, at 5:00 p.m.

Accommodations

The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. Requests must be made by Thursday, May 1, 2025, at 5:00 p.m.

Contact

Bailey Yuhas
(406) 444-4094
hhsadminrules@mt.gov
Fax: (406) 444-9744

Rulemaking Actions

AMEND

The rules proposed to be amended are as follows, stricken matter interlined, new matter underlined:

37.86.2901 INPATIENT HOSPITAL SERVICES, DEFINITIONS

- (1) "Acute care psychiatric hospital" means a psychiatric facility accredited by the Joint Commission on Accreditation of Health Care Organizations that is devoted to the provision of inpatient psychiatric care for persons under the age of 21 and licensed as a hospital by:
 - (a) the department; or
 - (b) an equivalent agency in the state in which the facility is located.
- (2) "Administratively necessary days" or "inappropriate level of care services" means those services for which alternative placement of a client is planned and/or effected and for which there is no medical necessity for acute level inpatient hospital care.
- (3) "All patient refined diagnosis related groups (APR-DRGs)" means DRGs that classify each inpatient case based on claim information such as diagnosis, procedures performed, client age, client sex, and discharge status.
- (4) "Bad debt" means inpatient and outpatient hospital services provided in which full payment is not received from the client or from a third party payor, for which the provider expected payment and the persons are unable or unwilling to pay their bill. Bad debts may be for services provided to clients who have no health insurance or clients who are underinsured and are net of payments (the amount

that remains after payment) made toward these services. For the purpose of uncompensated care, bad debt is measured on the basis of revenue forgone, at full established rates, and bad debt does not include either provider discounts or Medicare bad debt.

- (5) "Base price" means a dollar amount, including capital expenses, that is reviewed by the department each year to allow for appropriation neutrality.
- (6) "Border hospital" means a hospital located outside Montana, but no more than 100 miles from the border.
- (7) "Capital related cost" means a cost incurred in the purchase of land, buildings, construction, and equipment as provided in 42 CFR 413.130.
- (8) "Center of Excellence" means a hospital specifically designated by the department as being able to provide a higher level multi-specialty of comprehensive care and meets the criteria in ARM 37.86.2947(3).
- (9) "Charity care" means free or discounted inpatient and outpatient hospital services provided to persons who meet the hospital's eligibility criteria for financial assistance and are unable to pay for all or a portion of the services. ~~in which hospital policies determine the client is unable to pay and the hospital did not expect to receive full reimbursement. Charity care eligibility is determined pursuant to a hospital's policies.~~ results from a provider's hospital's policy to provide health care services free of charge (or where only partial payment is expected) to individuals who meet certain financial criteria. For the purpose of uncompensated care, charity care is measured on the basis of revenue forgone, at full established rates. Charity care does not include contractual write-offs.
- (10) "Clinical trials" means trials that are directly funded or supported by centers or cooperating groups funded by the National Institutes of Health (NIH), the Centers for Disease Control and Prevention (CDC), the Agency for Healthcare Research and Quality (AHRQ), the Centers for Medicare and & Medicaid Services (CMS), the Department of Defense (DOD), or the Department of Veterans Affairs Administration (VA).
- (11) "Cost-based hospital" means a licensed acute care hospital that is reimbursed on the basis of allowable costs.
- (12) "Cost outlier" means an additional payment for unusually high cost cases that exceeds the cost outlier thresholds as set forth in ARM 37.86.2916.
- (13) "Critical access hospital" means a limited-service rural hospital licensed by the Montana Department of Public Health and Human Services.
- (14) "Direct nursing care" means the care given directly to the client ~~which~~ that requires the skills and expertise of an registered nurse (RN) or licensed practical nurse (LPN).

(15) "Discharging hospital" means a hospital, other than a transferring hospital as described in (45), that formally discharges an inpatient. Release of a client to another hospital, as described in (39), or a leave of absence from the hospital, is not will not be recognized as a discharge. A client who dies in the hospital is considered a discharge.

(16) "Disproportionate share hospital" means a hospital serving a disproportionate share of low income clients as defined in section 1923 of the Social Security Act.

(17) "Disproportionate share hospital specific uncompensated care" means the costs of inpatient and outpatient hospital services provided to clients who have no health insurance or source of third party coverage.

(18) "Distinct part psychiatric unit" means a psychiatric unit of an acute care general hospital that meets the requirements of 42 C.F.R. part § 412.27. (2008).

(19) "Distinct part rehabilitation unit" means a rehabilitation unit of an acute care general hospital that meets the requirements in 42 C.F.R. §§ 412.25 and 412.29.

(20) "Early elective delivery" means either a nonmedically necessary labor induction or cesarean section that is performed prior to 39 weeks and 0/7 days gestation.

(21) "Experimental/investigational service" means a noncovered item or procedure considered experimental and/or investigational by the U.S. Department of Health and Human Services or any other appropriate federal agency.

(22) "Graduate medical education" (GME) means a postgraduate primary care residency program approved by the Accreditation Council for Graduate Medical Education (ACGME) offered by an eligible in-state hospital for the purpose of providing formal hospital-based training and education under the supervision of a licensed medical physician.

(23) "Hospital Acquired Condition (HAC)" means a condition that occurs during an inpatient hospital stay and results in a high cost or high volume of care or both; results in a claim being assigned to a diagnosis related group (DRG) that has a higher payment when present as a secondary diagnosis; and could have reasonably been prevented through the application of evidence-based guidelines as defined in § 5001(c) of the Deficit Reduction Act of 2005.

(24) "Hospital reimbursement adjustor (HRA)" means a payment to a Montana hospital as specified in ARM 37.86.2928 and 37.86.2940.

(25) "Hospital resident" means a person client who is unable to be cared for in a setting other than the acute care hospital as provided in ARM 37.86.2921.

(26) "Inpatient" means a person who has been admitted to a hospital for bed occupancy for purposes of receiving inpatient hospital services. A person generally is considered an inpatient if formally admitted as an inpatient with an expectation that the client person will remain in the hospital for more than 24 hours. The

physician or other practitioner is responsible for deciding whether the client person should be admitted as an inpatient. Inpatient hospital admissions are subject to retrospective review by the department or the department's designated review organization to determine whether the inpatient admission was medically necessary for Medicaid payment purposes.

(27) "Inpatient hospital services" means services that are ordinarily furnished in an acute care hospital for the care and treatment of an inpatient under the direction of a physician, dentist, or other practitioner as permitted by federal law, and that are furnished in an institution that:

- (a) is licensed or formally approved as an acute care hospital by the officially designated authority in the state where the institution is located;
- (b) except as otherwise permitted by federal law, meets the requirements for participation in Medicare as a hospital and has in effect a utilization review plan that meets the requirements of 42 C.F.R. § 482.30; or
- (c) provides acute care psychiatric hospital services as defined in this rule for individuals under age 21.

(28) "Inpatient hospital utilization fee" means the utilization fee collected by the Department of Revenue as provided in 15-66-102, MCA.

(29) "Inpatient rehabilitation facility (IRF)" means a free standing rehabilitation hospital or rehabilitation unit located in a hospital.

(29)(30) "Interim claim" in a prospective payment system (PPS) hospital means a claim being billed for an inpatient hospital stay equal to or exceeding 30 days at the same facility as referenced in ARM 37.86.2905.

(30)(31) "Long-acting reversible contraceptives (LARCs)" means intrauterine devices and contraceptive implants that provide long-acting reversible contraception.

(31)(32) "Long term acute care hospital (LTCH LTAC)" means an acute care hospital as defined in 42 C.F.R. § 412.23.

(32)(33) "Low income utilization rate" means a hospital's percentage rate as specified in ARM 37.86.2935.

(33)(34) "Medicaid inpatient utilization rate" means a hospital's percentage rate as specified in ARM 37.86.2932.

(34)(35) "Out-of-state hospital" means a hospital located more than 100 miles beyond the Montana state border.

(35)(36) "Partial eligibility" means a client that is only eligible for Medicaid benefits during a portion of the inpatient hospital stay as specified in ARM 37.86.2918.

(36)(37) "Present on Admission (POA)" means conditions that are present at the time a medical order for an inpatient admission occurs.

(37)(38) "Prior authorization (PA)" means the approval process required before certain services are paid by Medicaid. Prior authorization must be obtained before providing the service.

(38)(39) "Prospective payment system (PPS) hospital" means a hospital reimbursed pursuant to the diagnosis related group (DRG) system. DRG hospitals are classified as such by the Centers for Medicare and Medicaid Services (CMS) in accordance with 42 C.F.R. part § 412.

(39)(40) "Relative weight" means a weight assigned from a national database from 3M that reflects the typical resources consumed per APR-DRG.

(40)(41) "Routine disproportionate share hospital" means a hospital in Montana which meets the criteria of ARM 37.86.2931.

(41)(42) "Rural hospital" means for purposes of determining disproportionate share hospital payments, an acute care hospital that is located within a "rural area" as defined in 42 C.F.R. § 412.62(f)(iii).

(42)(43) "Sole community hospital" means a DRG reimbursed hospital classified as such by the Centers for Medicare and Medicaid Services (CMS) in accordance with 42 C.F.R. § 412.92(a) through (d).

(43)(44) "Third party liability (TPL)" means any entity that is, or may be, liable to pay all or part of the medical cost of care for a Medicaid eligible client.

(44)(45) "Transferring hospital" means a hospital that formally releases an inpatient client to another inpatient hospital or inpatient unit of a hospital.

(45)(46) "Transplant" means to transfer either tissue or an organ from one body or body part to another as referenced in ARM 37.86.4701. A transplant may be either:

- (a) "organ transplantation,"; the implantation of a living, viable, and functioning human organ for the purpose of maintaining all or a major part of that organ function in the client; or
- (b) "tissue transplantation,"; the implantation of living, human tissue.

(46)(47) "Uncompensated care" means hospital services provided in which no payment is received from the client or from a third party payor. Uncompensated care includes charity care and bad debts.

(47)(48) "Upper payment limit" means a federal limit placed on fee-for-service reimbursement of Medicaid providers.

(48)(49) "Urban hospital" means an acute care hospital that is located within a metropolitan statistical area, as defined in 42 C.F.R. § 412.62(f)(2).

Authorizing statute(s): 53-2-201, 53-6-113, MCA

Implementing statute(s): 53-2-201, 53-6-101, 53-6-111, 53-6-113, ~~53-6-141~~, 53-6-149, MCA

37.86.2907 INPATIENT HOSPITAL PROSPECTIVE REIMBURSEMENT, APR-DRG PAYMENT RATE DETERMINATION

- (1) The department's all patient refined diagnosis related groups (APR-DRG) prospective payment rate for inpatient hospital services is based on the classification of inpatient hospital discharges to APR-DRGs. The provider reimbursement rates for inpatient hospital services, except as otherwise provided in ARM 37.85.206, ~~is~~ are stated in the department's APR-DRG fee schedule adopted and effective at ARM 37.85.105. The procedure for determining the APR-DRG prospective payment rate is as follows:
 - (a) The department will assign an APR-DRG to each Medicaid client discharge in accordance with the current APR-grouper program version, as developed by 3M Health Information Systems. The assignment and reimbursement of each APR-DRG is based on:
 - (i) ~~the ICD-9-CM principal diagnoses for dates of discharge prior to and including September 30, 2015, and the ICD-10-CM principal diagnoses for dates of discharge October 1, 2015 and thereafter;~~
 - (ii) ~~all ICD-9-CM secondary diagnoses for dates of discharge prior to and including September 30, 2015, and the ICD-10-CM secondary diagnoses for dates of discharge October 1, 2015 and thereafter;~~
 - (iii) ~~all ICD-9-CM medical procedures performed during the client's hospital stay for dates of discharge prior to and including September 30, 2015, and the ICD-10-PCS medical procedures performed during the client's hospital stay for dates of discharge October 1, 2015 and thereafter;~~
 - (iv) the client's age;
 - (v) the client's gender;
 - (vi) the client's discharge status; and
 - (vii) diagnosis codes related to hospital-acquired conditions that are not present or undetermined to be present on admission.
 - (b) For each APR-DRG, the department determines a relative weight using a national database from 3M that reflects the cost of hospital resources used to

treat cases. The relative weights have been re-centered so that the average Montana Medicaid stay has a base weight of 1.00. Adjustments are applied to specific APR-DRG weights to reflect department policy. The relative weight for each APR-DRG is available upon request from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

- (c) The department computes a Montana average base price per case. This base price includes in-state and out-of-state distinct part rehabilitation units. The effective date and base rate amount is adopted and effective as provided at ARM 37.85.105. Disproportionate share payments are not included in this price.
- (d) The department computes a base price for long term acute care (LTAC) hospitals. The effective date and base rate amount is adopted and effective as provided at ARM 37.85.105. Disproportionate share payments are not included in this price.
- (e) The department computes a base price for inpatient rehabilitation facilities (IRFs). The effective date and base rate amount is adopted and effective as provided at ARM 37.85.105. Disproportionate share payments are not included in this price.
- (f) The department computes a base price for Center of Excellence hospitals. The effective date and base rate amount is adopted and effective as provided at ARM 37.85.105. Disproportionate share payments are not included in this price.
- (g) The relative weight for the assigned APR-DRG is multiplied by the average base price per case to compute the APR-DRG prospective payment rate for that Medicaid client discharge.
- (h) For claims with dates of payment on or after August 1, 2011, when a hospital-acquired condition (HAC) occurs during hospitalization and the condition was not present or undetermined to be present on admission, claims will be paid as though the diagnosis is not present or undetermined to be present. ~~Hospital acquired conditions refers to the Centers for Medicare and Medicaid Services (CMS) definition as provided in Section 1886(d)(4) of the Social Security Act.~~
- (i) Inpatient reimbursement will be calculated at the lesser of the assigned APR-DRG rate or the claim billed charges.

(2) The department adopts and incorporates by reference the APR-DRG Table of Weights and Thresholds adopted and effective at ARM 37.85.105. The Montana Medicaid APR-DRG relative weight values, average national length of stay (ALOS), outlier thresholds, and APR-DRG grouper are contained in the APR-DRG Fee

Schedule which is adopted and effective as provided at ARM 37.85.105 and published by the department. Copies may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

Authorizing statute(s): 2-4-201, 53-2-201, 53-6-113, MCA

Implementing statute(s): 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

Reasonable Necessity Statement

The Department of Public Health and Human Services is proposing to amend ARM 37.86.2901 and 37.86.2907.

Inpatient rehabilitation facilities (IRFs) are free standing rehabilitation hospitals or rehabilitation units located in a hospital. IRF patients must be able to do intense rehabilitation, which requires three hours of rehabilitation per day at a minimum of five days per week. IRF patient rehabilitation schedules result in shorter patient stays. The first IRF opened in Montana in 2019, but no rules currently exist to define IRFs or to establish a base rate for this type of hospital. IRF patients are generally more complex than general hospital patients but not as complex as long term acute care hospital (LTAC) patients. It is necessary to establish an appropriate base rate for IRFs because they are a distinct type of hospital that needs a base rate allowing IRFs to better cover their complex patient costs. The Health Resources Division recommends setting the IRF base rate at \$6,790.

37.86.2901

The department proposes adding language to the rule to define “inpatient rehabilitation facility (IRF).” CMS distinguishes IRFs from other types of hospitals for certification, compliance, and reimbursement purposes. This rule complies with the department’s obligation to implement CMS definitions. The department also proposes revisions to certain definitions to correct references and/or to clarify the definition of the terms.

37.86.2907

The department proposes to delete out-of-date references to ICD-9-CM in ARM 37.86.2907(1)(a). The department also proposes to insert a new (1)(e) (and renumber the subsequent provisions accordingly) to indicate that it will compute IRF base rates similar to the manner in which it computes base rates for LTAC hospitals and Center of Excellence hospitals. The department also proposes to delete reference to the CMS definition of “hospital-acquired conditions” in newly renumbered (1)(h).

Fiscal Impact

Category	FFY2024	Federal	State	FFY2025	Federal	State
Medicaid	\$24,540.51	\$15,775.87	\$8,764.64	\$25,952.99	\$16,641.05	\$9,311.93
Expansion	\$24,958.91	\$22,463.02	\$2,495.89	\$25,269.20	\$22,742.28	\$2,526.92
Total	\$49,499.42	\$38,238.89	\$11,260.53	\$51,222.19	\$39,383.33	\$11,838.85
Category	SFY2024	Federal	State	SFY2025	Federal	State
Medicaid	\$18,405.38	\$11,854.91	\$6,550.48	\$25,522.13	\$16,364.79	\$9,157.34
Expansion	\$18,719.18	\$16,847.26	\$1,871.92	\$25,957.26	\$23,361.54	\$2,595.73
Total	\$37,124.57	\$28,702.17	\$8,422.39	\$51,479.40	\$39,726.33	\$11,753.07
*** SFY2024 is only 9 months due to the 10/1/2023 start date						

Effective Date

The department intends for these rule amendments to be effective retroactive to October 1, 2023.

Small Business Impact

Pursuant to 2-4-111, MCA, the department has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

Bill Sponsor Notification

The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Interested Persons

The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in this notice.

Medicaid Performance-Based Statement

Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

Rule Reviewer

Bree Gee

Approval

Charles T. Brereton, Director
Department of Public Health and Human Services



MONTANA
ADMINISTRATIVE
REGISTER



DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF PROPOSED RULEMAKING

MAR NOTICE NO. 2025-276.1

Summary

Amendment of ARM 37.34.1902, 37.34.1918, and 37.34.1930 pertaining to Applied Behavior Analysis Services

Hearing Date and Time

Thursday, May 15, 2025, at 10:00 a.m.

Virtual Hearing Information

Join Zoom Meeting at: <https://mt-gov.zoom.us/j/85745002873?pwd=I7irAf31XEtHv0QqK9OIE5WZ6Rhx0q.1>,

Meeting ID: 857 4500 2873, and password: 267855; or

Dial by telephone: +1 646 558 8656, meeting ID: 857 4500 2873, and password: 267855. Find your local number: <https://mt-gov.zoom.us/u/kcrtJ2waax>.

Comments

Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may be submitted using the contact information below. Comments must be received by Friday, May 23, 2025, at 5:00 p.m.

Accommodations

The agency will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. Requests must be made by Thursday, May 1, 2025, at 5:00 p.m.

Contact

Bailey Yuhas
(406) 444-4094
hhsadminrules@mt.gov
Fax: (406) 444-9744

Rulemaking Actions

AMEND

The rules proposed to be amended are as follows, stricken matter interlined, new matter underlined:

37.34.1902 DEFINITIONS

The definitions applicable to Applied Behavior Analysis (ABA) therapy services are as follows:

- (1) "Applied Behavior Analysis" (ABA) means a type of therapy that applies human behavior principles to improve a member's adaptive functioning and reduce problem behaviors due to a psychiatric and/or behavioral condition.
- (2) "Autism spectrum disorder" (ASD) means a condition as defined in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR) of the American Psychiatric Association. The DSM-5 ASD definition is adopted and incorporated by reference. The DSM-5 defines and classifies mental disorders. A copy is available for public inspection at: Department of Public Health and Human Services, Behavioral Health and Developmental Disabilities Division, Developmental Disabilities Program, 111 N. Sanders, Helena, MT 59604-4210. A copy may be purchased online at <https://dsm.psychiatryonline.org/doi/book/10.1176/appi.books.9780890425787>.
- (3) "Behavior identification assessment" (BIA) means a developmentally appropriate assessment that identifies strengths and weaknesses across domains and potential barriers to progress. Areas of assessment may include challenging behaviors and skill deficits, co-occurring medical and psychiatric conditions, cognitive, adaptive, and developmental functioning, and family dynamics.

- (4) "Board Certified Behavior Analyst[®]" (BCBA) means an individual with a graduate-level certification in behavior analysis who has been certified by the Behavior Analyst Certification Board (BACB). Professionals certified at the BCBA level are independent practitioners who provide ABA services.
- (5) "Board Certified Behavior Analyst-Doctoral[®]" (BCBA-D) means a Board Certified Behavior Analyst who has earned their PhD, in addition to their Master's and/or Bachelor's degrees, and had been certified by the BACB. Any reference to a BCBA in these rules includes BCBA-Ds, unless indicated otherwise.
- (6) "Board Certified Assistant Behavior Analyst[®]" (BCaBA) means an individual with an undergraduate level certification in behavior analysis who has been certified by the BACB. Professionals certified at the BCaBA level provide behavior analysis services under the supervision of a BCBA.
- (7) "DD eligible" means a member found eligible for the receipt of state-sponsored developmental disabilities services pursuant to ARM 37.34.201.
- (8) "Department" means the Montana Department of Public Health and Human Services.
- (9) "Developmental disability" (DD) means a condition or disability that meets the definition of "developmental disability" set forth in 53-20-202(3), MCA.
- (10) "Diagnostic evaluation" means an evaluation performed by a qualified health care professional with expertise in the diagnostic area, that establishes the qualifying diagnosis through interview, observation, and formal assessment tools appropriate to the condition for which services are requested. The qualified health care professional with expertise in the diagnosis area may use assessments from professionals outside of their fields to obtain information that contributes to the diagnostic process.
- (11) "Eligibility criteria" means those criteria established for the purposes of the program of ABA services authorized by the department, as specified in the Montana Medicaid Applied Behavior Analysis Services Manual (ABA Services Manual), dated ~~July 1, 2023~~ March 1, 2025. The department adopts and incorporates by reference the ABA Services Manual which provides the public with greater detail about ABA services. Any conflict between these rules and what is outlined in the ABA Services Manual should be resolved in favor of what is written in these rules. A copy may be accessed on the DPHHS website at the following link:
<https://medicaidprovider.mt.gov/manuals/appliedbehavioranalysisservicesmanual> or a paper copy may be obtained from the department by a request in writing to the Department of Public Health and Human Services, Behavioral Health and Developmental Disabilities Division, Developmental Disabilities Program, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210 or at
<https://medicaidprovider.mt.gov/76>.

- (12) "Functional impairment criteria" are defined in the ABA Services Manual.
- (13) "Member" means a person enrolled in Montana Medicaid who is eligible to receive ABA services.
- (14) "Provisional qualifying diagnosis" means a member's diagnosis that qualifies the member for initiation of ABA services but that has not yet been confirmed by a qualified health care professional with expertise in the diagnostic area. The diagnosis must meet functional impairment criteria and be:
 - (a) SED;
 - (b) ASD; or
 - (c) DD eligible.
- (15) "Qualified health care professional with expertise in the diagnostic area," for the purpose of Montana Medicaid ABA therapy services, refers to a licensed professional with formal training in child and adolescent psychiatric diagnosis and treatment, and has training specific to SED and ASD. A qualified health care professional with expertise in the diagnostic area must belong to one of the following categories:
 - (a) child and adolescent psychiatrist;
 - (b) general psychiatrist;
 - (c) psychiatric mental health nurse practitioner;
 - (d) developmental pediatrician;
 - (e) neurologist;
 - (f) neuropsychologist or psychologist;
 - (g) pediatrician;
 - (h) family physician;
 - (i) family or pediatric nurse practitioner;
 - (j) physician assistant;
 - (k) clinical professional counselor; or
 - (l) clinical social worker.
- (16) "Qualifying diagnosis" means a member's diagnosis that is established by a qualified health care professional with expertise in the diagnostic area through a diagnostic evaluation. The diagnosis must meet functional impairment criteria and the diagnosis must be:
 - (a) SED;

- (b) ASD; or
- (c) DD eligible.

(17) "Registered behavior technician" (RBT) means an individual with a paraprofessional certification by the BACB in behavior analysis. The RBT assists in delivering behavior analysis services and practices under the direction and close supervision of a BCBA. The supervising BCBA is responsible for all work the RBT performs.

(18) "Serious emotional disturbance" (SED), for the purposes of the program of ABA services authorized by the department, is a mental disorder as defined in the Clinical Guidelines chapter of the ABA Services Manual.

(19) "Treatment plan" means an individualized written document that has been developed from the BIA and contains all the critical features listed in the Applied Behavior Analysis Practice Guidelines for the Treatment of Autism Spectrum Disorder: Practice Guidelines Guidance for Healthcare Funders, Regulatory Bodies, Service Providers, and Managers Consumers, Second Third Edition (ABA Treatment of ASD: Practice Guidelines) issued by the Behavior Analyst Certification Board, Inc. (BACB) and/or Council of Autism Service Providers. The department adopts and incorporates by reference the ABA Treatment of ASD: Practice Guidelines, which provides guidelines and other information about ABA treatment for ASD. A copy is available for public inspection at the Department of Public Health and Human Services, Behavioral Health and Developmental Disabilities Division, Developmental Disabilities Program, located at 111 N. Sanders, Helena, MT 59604-4210 and is available online at <https://www.casproviders.org/asd-guidelines> https://assets002.noviams.com/novi_file_uploads/casp/pdfs_and_documents/ASD_Guidelines/ABA-ASD-Practice-Guidelines.pdf.

(20) "Unit of service" means 15 minutes of treatment service.

Authorizing statute(s): 53-2-201, 53-6-113, 53-21-703, MCA

Implementing statute(s): 53-1-601, 53-1-602, 53-2-201, 53-6-101, MCA

37.34.1918 SERVICE REQUIREMENTS

- (1) Services are covered only when within the scope of the provider's license. All providers must comply with all applicable state and federal statutes, rules, and regulations.
- (2) Individuals receiving ABA services must meet the department's applicable initial and/or continuing eligibility criteria. The services delivered must meet all the following service requirements:

- (a) The services must be approved by utilizing the processes, including the authorization process, outlined in the ABA Services manual. The ABA provider must satisfy the service requirements listed here and in the ABA Services manual.
- (b) The services must be directed by a BCBA or BCBA-D. Some services may be provided by a BCaBA or an RBT if the BCaBA or RBT meets the qualifications of ARM 37.34.1930 and is supervised by the BCBA in accordance with ARM 24.189.910 37-17-403 and 37-17-405, MCA.
- (c) The services delivered must be consistent with the following elements as outlined in the Applied Behavior Analysis Practice Guidelines for the Treatment of Autism Spectrum Disorder: Guidance for Healthcare Funders, Regulatory Bodies, Service Providers, and Consumers, Third Edition ABA Treatment of ASD Practice Guidelines:
 - (i) ABA core characteristics;
 - (ii) Essential practice elements; and
 - (iii) Assessment, formulation of treatment goals, and measurement of client progress.
- (d) Services are delivered in compliance with the member's individualized treatment plan, developed within 30 calendar days of onset of services, and containing all the critical features listed in the ABA Treatment of ASD Practice Guidelines Applied Behavior Analysis Practice Guidelines for the Treatment of Autism Spectrum Disorder: Guidance for Healthcare Funders, Regulatory Bodies, Service Providers, and Consumers, Third Edition.
- (e) Services must be provided or supervised by the BCBA, BCBA-D, or BCaBA who wrote the treatment plan.
- (f) Services must be provided to the member in person, with the provider and the member in the same physical location, unless specifically authorized in writing by the department.

- (3) ABA services may continue so long as the member does not meet any of the service exclusion criteria set forth in ARM 37.34.1912(3)(b).
- (4) In addition to the requirements outlined in this rule, the ABA Services manual sets forth requirements, request and review processes, and procedures for ABA services with which an ABA provider must comply.

Authorizing statute(s): 53-2-201, 53-6-113, 53-21-703, MCA

Implementing statute(s): 37-17-403, 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-21-701, 53-21-702, MCA

37.34.1930 PROVIDER REQUIREMENTS

- (1) A BCBA/BCBA-D must:
 - (a) comply with, and agree to be bound by, all laws, rules, regulations, and policies generally applicable to Medicaid providers including the provisions of ARM 37.85.401, 37.85.402, 37.85.406, 37.85.407, 37.85.410, 37.85.414, and 37.85.415;
 - (b) be licensed and have met the licensure requirements for the State of Montana located in ~~ARM 24.189.901 set forth in 37-17-403 and 37-17-405, MCA~~;
 - (c) follow all supervision requirements of ~~ARM 24.189.910 set forth in 37-17-403 and 37-17-405, MCA~~; and
 - (d) maintain responsibility for billing for BCaBA's and RBT's services and assuring that the services are delivered in accordance with the member's Treatment Plan.
- (2) A BCaBA must:
 - (a) be licensed and have met the licensure requirements for the State of Montana found in ~~ARM 24.189.907 set forth in 37-17-403 and 37-17-405, MCA~~; and
 - (b) work under the oversight of a BCBA who assumes full professional responsibility for the services delivered and billed.
- (3) An RBT must work under the oversight of a BCBA who bills and assumes full responsibility for services delivered.

Authorizing statute(s): 53-2-201, 53-6-113, 53-21-703, MCA

Implementing statute(s): 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-21-701, 53-21-702, MCA

Reasonable Necessity Statement

The Department of Public Health and Human Services (department) is proposing to amend ARM 37.34.1902, 37.34.1918, and 37.34.1930 pertaining to the Applied Behavior Analysis (ABA) program.

The department's Developmental Disabilities Program (DDP) is proposing to adopt an updated ABA Services Manual to address issues raised by ABA providers, the department's authorization review contractor, and the Children's Mental Health Bureau (CMHB). The updated manual would also update language to allow usage of the most current edition of referenced materials.

ARM 37.34.1902

The department proposes to adopt and incorporate by reference the March 1, 2025 ABA Services Manual in (11). The March 1, 2025 ABA Services Manual can be located at <https://dphhs.mt.gov/BHDD/DisabilityServices/developmentaldisabilities/>. DDP proposes amending (11) to adopt and incorporate the updated ABA Services Manual which includes the following proposed changes:

1. Clarification on Intermediate professionals. ABA providers have reported that the ABA Services Manual's definition of intermediate professionals is ambiguous and have requested the proposed clarification which conveys that intermediate professionals may complete their required coursework in tandem with the experience portion of their training.
2. Process for requesting information (RFI) if there are missing documents and issuing technical denials during authorization reviews. The department's authorization review contractor has requested this proposed change to be consistent with the CMHB authorization review process.
3. Updated Additional Units of Service Request and Provider Transfer Request forms to include distinct fields for ABA providers to enter their group national provider identifier (NPI) and rendering NPI. This proposed change is necessary as it allows the contractor to associate the authorization with the correct NPI. The department's authorization review contractor has also requested a distinct field in the Additional Units of Service Request form for providers to enter the original start date of ABA services, which is another proposed change to the ABA Services Manual.
4. CMHB has reported that unless the ABA eligibility span in Medicaid Management Information System (MMIS) is end dated after an ABA provider discontinues ABA services, CMHB services are incorrectly denied. DDP proposes to include a termination of service section in the ABA Services Manual to advise providers how to report the discontinuation of ABA services to the department.
5. Proposed updated language to allow usage of the most current edition of referenced materials.

ARM 37.34.1918

In (2)(b), the rule references ARM 24.189.910, which was repealed by the Department of Labor and Industry (DLI). DDP proposes to amend this rule to remove this rule reference and replace the reference with reference to the applicable statutes. DDP also proposes to amend (2)(c) and (d) to allow usage of the third edition of the Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders, Regulatory Bodies, Service Providers, and Consumers.

ARM 37.34.1930

In (1)(b), (1)(c), and (2)(a), the rule references ARM 24.189.901 and 24.189.910, which were repealed by DLI. DDP proposes to amend this rule to remove these rule references and to replace them with references to the applicable statutes.

Fiscal Impact

The department does not anticipate a fiscal impact.

Effective Date

The department intends for these rule amendments to be retroactively effective to March 1, 2025.

Interested Persons

The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the department. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be emailed, mailed or otherwise delivered to the contact person above.

Bill Sponsor Notification

The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Small Business Impact

Pursuant to 2-4-111, MCA, the department has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

Medicaid Performance-Based Statement

Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

Rule Reviewer

Olivia Schuler

Approval

Charles T. Brereton, Director
Department of Public Health and Human Services



DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF PROPOSED RULEMAKING

MAR NOTICE NO. 2025-278.1

Summary

Amendment of ARM 37.34.1401, 37.34.1402, 37.34.1404, 37.34.1411, 37.34.1412, 37.34.1418, 37.34.1420, and 37.34.1422 and repeal of ARM 37.34.1405 pertaining to Positive Behavior Support Systems

Hearing Date and Time

Friday, May 16, 2025, at 9:00 a.m.

Virtual Hearing Information

Join Zoom Meeting at: <https://mt-gov.zoom.us/j/81844081054?pwd=XiuDmTzNSQbwosEvo8l157Ay4xuDTu.1>,

Meeting ID: 818 4408 1054, and password: 917559; or

Dial by telephone: +1 646 558 8656, meeting ID: 818 4408 1054, and password: 917559. Find your local number: <https://mt-gov.zoom.us/u/kbnGUZecDQ>.

Comments

Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may be submitted using the contact information below. Comments must be received by Friday, May 23, 2025, at 5:00 p.m.

Accommodations

The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. Requests must be made by Friday, May 2, 2025, at 5:00 p.m.

Contact

Bailey Yuhas
(406) 444-4094
hhsadminrules@mt.gov
Fax: (406) 444-9744

Rulemaking Actions

AMEND

The rules proposed to be amended are as follows, stricken matter interlined, new matter underlined:

37.34.1401 POSITIVE BEHAVIOR SUPPORT: PURPOSE

- (1) The purpose of the rules under this subchapter is to require the use of positive behavior supports intended to encourage individual growth, improve quality of life, and reduce the use of unnecessary intrusive measures for persons receiving services funded through the department by DDP. Positive behavior Behavior support focuses both on what is important to the person as well as what is important for the person an individual and what is important for when encouraging growth and change. This rule subchapter prohibits the use of seclusion or the use of or procedures which are abusive, or demeaning procedures, or procedures that cause pain or discomfort, pursuant to the provisions of ARM 37.34.1418. Emergency procedure exceptions are as provided for in the emergency procedures allowed for in ARM 37.34.1420. This subchapter applies to persons receiving services from community-based providers that are funded entirely or in part by the department.

Authorizing statute(s): 53-6-402, 53-20-204, MCA

Implementing statute(s): 53-6-402, 53-20-203, MCA

37.34.1402 POSITIVE BEHAVIOR SUPPORT: APPLICABILITY

(1) All children and adults receiving services from community-based providers that are funded entirely or in part by the department through DDP must be afforded the protections imposed by these rules. Any service provider approved by DDP through the provider enrollment process, (i.e., a DDP qualified service provider) contracting with the department to provide services to persons with developmental disabilities must conduct its activities in accordance with these rules.

Authorizing statute(s): 53-6-402, 53-20-204, MCA

Implementing statute(s): 53-6-402, 53-20-203 MCA

37.34.1404 POSITIVE BEHAVIOR SUPPORT: DEFINITIONS

For the purposes of this subchapter, the following definitions apply:

(1) "Advocate" is defined in ARM 37.34.102.

(2) "Alternative behavior" means a behavior that can, but is not likely to occur at the same time as a challenging behavior.

(3) "Challenging behavior" means a behavior that presents a risk or potential risk to the health or safety of a the person or to others.

(4) "Contingent observation" means a method of decreasing a challenging behavior by telling the person what they are doing wrong and asking the person to not participate in the ongoing activity for a short period of time, to be seated nearby, and to observe others engaging in a specific appropriate behavior and receiving positive reinforcement for it. The person who is observing the behavior may rejoin the activity group when the person agrees to behave appropriately. The person's appropriate behavior is then reinforced when the person exhibits the appropriate behavior.

(4) "Chemical restraint" means any drug that is used for discipline or staff convenience and is not required to treat medical symptoms.

(5) "Coercion" means the practice of persuading a person to do something by using force or threats.

(5)(6) "Contingent access" to social activities and personal possessions including personal funds" means that upon the restriction of access to activities, places, and items, including personal possessions, as a result of the occurrence of a specified challenging behavior, the person's attendance at social activities and use of personal possessions including personal funds is restricted.

{6}(7) "Corporal punishment" means knowingly and purposefully inflicting physical pain on a person as a disciplinary measure.

(8) "DDP" means the Developmental Disabilities Program.

{7}(9) "Educational fine," also known as token or point removal, means a ~~system method~~ of decreasing challenging behavior ~~by reducing the quantity of earned tokens or points based upon a token or point system~~. A small fine is levied contingent upon the occurrence of a challenging behavior. ~~A teaching episode must accompany each fine which includes a description of the challenging behavior, the amount of the fine, instruction on the appropriate forms of behavior, and the opportunity for the person to "earn back" a portion of the fine~~ ~~the token(s) or point(s) for~~ by practicing the appropriate behaviors.

{8}(10) "Exclusion time out" means a method of decreasing a challenging behavior by requiring a person to leave an ongoing reinforcing situation for a period of time, contingent on the occurrence of some previously specified challenging behavior. ~~Unlike contingent observation, the~~ The person is not instructed to observe the appropriate behavior of others.

{9}(11) "Graduated guidance" means systematically providing the minimum degree of physical assistance necessary to ensure that a desired behavior occurs. Graduated guidance is a technique combining physical guidance and fading in which the physical guidance is systematically and gradually reduced and faded according to the person's responsiveness. Graduated guidance techniques do not include physical restraint ~~as a primary component~~. Graduated guidance is assistive rather than restrictive and does not involve forced compliance.

{10}(12) "Mechanical restraint" means a physical device used to restrict the person's movement or restrict the normal function of the person's body. The term "mechanical restraint" does not include safety devices or medically related restraints. The definition does not include the following:

- (a) ~~physical equipment or orthopedic appliances, surgical dressings or bandages, supportive body bands or other restraints necessary for medical treatment, routine physical examinations, or medical tests;~~
- (b) ~~devices used to support functional body position or proper balance; or~~
- (c) ~~equipment used for safety during transportation.~~

(13) "Medically related restraint" means physical equipment or orthopedic appliances. Medically related restraint includes devices used to support functional body position or proper balance; surgical dressings or bandages; and supportive body bands or other restraints, including manual holds, necessary for the person to receive medical treatment, routine physical examinations, or medical tests.
Medically related restraint requires a written order or other authorization from a

medical practitioner who is licensed to practice medicine, including physicians, physician assistants, and nurse practitioners.

(11)(14) "Overcorrection" means a technique used to decrease a challenging behavior, typically taking the form of asking or guiding a person to repeat the correct form of a behavior or activity. The two main types of overcorrection are restitutonal overcorrection and positive practice overcorrection.

(12)(15) "Physical enforcement" means a person is required to perform a behavior by another person using physical contact with them.

(13)(16) "Physical prompt" means a person physically guides the person to perform a response. Physical prompts are assistive rather than restrictive and do not involve forced compliance.

(14)(17) "Physical restraint" means the restriction of the person's movement by holding or applying physical pressure to bring the person's behavior under control in order to avoid the risk of serious harm to the person, or other person(s), or to the environment. The term "physical restraint" does not include the use of physical prompts, or graduated guidance, or medically related restraints.

(15)(18) "Positive practice overcorrection" means a form of overcorrection in which requiring the person engaging in a challenging behavior is asked or guided to intensely repeatedly practice a specified appropriate alternative form of the behavior.

(16) "Required relaxation" means ~~requiring the person to relax quietly for a period of time after the occurrence of a challenging behavior.~~

(17)(19) "Response cost" means a procedure reducing accumulated reinforcement upon the occurrence of a challenging behavior, thus making the behavior less likely to occur.

(18)(20) "R~~estitutonal~~ overcorrection" means a form of overcorrection requiring asking or guiding a person engaging in a challenging behavior to restore the environment to its previous state and improve on the previous conditions.

(19)(21) "Restriction of rights" means procedures which involve withdrawal, delay, or curtailment of rights which the person may ordinarily exercise. Such withdrawal is usually in connection with a program through which the person may exercise such rights by performing specified behaviors.

(22) "Safety device" means a device used in accordance with a person's plan of care that reduces or inhibits the person's movement with the sole purpose of maintaining the safety of the person. Safety devices include: implements, garments, gates, locks or locking apparatuses, helmets, masks, gloves, straps, bed-rails, or belts.

(23) "Safety science" means applying scientific methods, research, and tools to understand, assess, and manage safety.

(20)(24) "Seclusion" means requiring the person to remain alone in a room or any area behind a closed door which prevents them from leaving or being observed for a period of time.

(25) "Therapeutic care" means care administered by licensed professionals such as speech, occupational, and physical therapies and mental/emotional counseling.

(26) "Trauma informed care" means an approach to care that recognizes the widespread impact of trauma and promotes environments of healing and recovery. Trauma informed care seeks to avoid re-traumatization and to understand and respond to signs and symptoms of trauma in individuals, families, and staff.

Authorizing statute(s): 53-6-402, 53-20-204, MCA

Implementing statute(s): 53-6-402, 53-20-203, MCA

37.34.1411 POSITIVE BEHAVIOR SUPPORT: FUNCTIONAL BEHAVIOR ASSESSMENT

(1) A functional behavior assessment is the gathering of information about a person's behavior based upon multiple information sources, including:

- a review of the person's records;
- personal observations;
- interviews with support providers;
- interviews with the person; and
- interviews with others who have personal knowledge of the person.

(2) A functional behavior assessment must include:

- a clear and measurable description of the challenging behavior, including frequency, duration, intensity, and severity of the behavior;
- a clear description of the need to alter the behavior;
- a clear description of medical, psychological, psychiatric, physiological, and environmental conditions in terms of how they may affect the occurrence of the challenging behavior;
- the events, times, and situations that predict both the occurrence and the nonoccurrence of the challenging behavior ~~and a description of the events immediately preceding and following the behavior;~~

- (e) summary statement(s) which explain(s) what regarding the function(s) that may be maintaining the challenging behavior; and
- (f) data confirming the function occurrences of the challenging behavior, and the strategies for reducing or eliminating the challenging behavior;
- (g) functional alternative behavior that serves to meet the same function as the challenging behavior; and
- (h) a clear and measurable procedure that will be used to alter the challenging behavior.

Authorizing statute(s): 53-6-402, 53-20-204, MCA

Implementing statute(s): 53-6-402, 53-20-203, MCA

37.34.1412 POSITIVE BEHAVIOR SUPPORT: BEHAVIOR SUPPORT PLAN

- (1) The behavior support plan is a formal written plan to address needs identified in a person's plan of care and must be developed for all persons engaging in challenging behavior. ~~A behavior support plan must be developed as required by ARM 37.34.1420(4).~~ The behavior support plan must be based on a functional behavior assessment as described in ARM 37.34.1411.
- (2) Behavior support plans:
 - (a) ~~utilize the basic principles of human behavior and learning and the principles of applied behavior analysis;~~
 - (b) ~~emphasize the development of the functional alternative behavior using positive approaches, positive behavior intervention, and positive reinforcement procedures;~~
 - (c)(a) use the least restrictive intervention possible;
 - (d) ~~describe how to rearrange environments, alter curricula or tasks, and adjust schedules;~~
 - (e) ~~are practical and appropriate for the settings where they will be implemented, for the person and for those who will implement the methods described;~~
 - (f)(b) are evaluated through timely review of specific data on the progress and effectiveness of the procedure;

- (g) identify functional alternative behavior that meets the same function as the challenging behavior;
- (h)(c) provide a clear and measurable procedure used to alter the challenging behavior;
- (d) include target behaviors;
- (f)(e) include a description of any restrictions necessary to protect the health and safety of the person, describe why the restrictions are necessary, and list the criteria for removing them;
- (f)(f) include reactive strategies to ensure the safety of the person and others; and
- (f)(g) are included in the person's plan of care.

(3) A behavior support plan must not include the use of seclusion restrictions or acts prohibited in ARM 37.34.1418; or the use of procedures which are aversive, abusive, or demeaning procedures; or procedures that cause pain or discomfort, except as provided for in the emergency procedures allowed for in ARM 37.34.1420.

(4) Use of the person's behavior support plan requires prior written consent from the following for approval:

- (a) the person;
- (b) the person's parent(s) if the person is under 18 years of age; and or
- (c) the person's legal representative guardian, if one has been appointed by the court.

(5) The person's planning team and the person's providers are responsible for the implementation of the person's behavior support plan.

(6) A behavior support plan must include appropriate measures for training and monitoring staff performance throughout the implementation of the behavior support plan.

Authorizing statute(s): 53-6-402, 53-20-204, MCA

Implementing statute(s): 53-6-402, 53-20-203, MCA

37.34.1418 POSITIVE BEHAVIOR SUPPORT: PROHIBITIONS

(1) The following may not be restricted for the any purposes, of including a positive behavior support plans or programs:

- (a) education and training services;
- (b) a safe environment to live, work, and receive treatment;
- (c) ~~an individual person-centered~~ plan of care;
- (d) prompt medical, ~~and dental, and therapeutic~~ care;
- (e) a nourishing, well-balanced diet;
- (f) assistance of an advocate;
- (g) exercise of voting rights;
- (g)(h) opportunity for religious worship; and
- (h)(i) just compensation for work performed; and
- (j) right to grievance processes.

(2) ~~Corporal punishment and verbal and physical abuse~~ The following acts are prohibited in the delivery of services to a person:-

- (a) chemical restraint;
- (b) coercion;
- (c) corporal punishment;
- (d) exclusion time out;
- (e) mechanical restraint;
- (f) physical enforcement;
- (g) physical restraint, except as authorized as an emergency procedure set forth in ARM 37.34.1420;
- (h) restitutional overcorrection;
- (i) seclusion; and
- (j) abuse as defined in 52-3-803, MCA.

Authorizing statute(s): 53-2-201, 53-20-204, MCA

Implementing statute(s): 53-20-203, 53-20-205, MCA

37.34.1420 POSITIVE BEHAVIOR SUPPORT: EMERGENCY PROCEDURES

- (1) Emergencies are situations in which the person, or other person(s) others, or the environment is/are at imminent risk of serious harm or damage injury due to the person's challenging behavior.
- (2) If an emergency occurs, a physical restraint the following procedures may be used if necessary to prevent the imminent risk of serious harm or damage injury to the person, or other person(s) others, or the environment but only if the following requirements are met:
 - (a) physical restraint; or staff members involved with the application of physical restraint must be trained to apply such restraints safely and properly;
 - (b) mechanical restraint, upon written order by a licensed physician for medical reasons. physical restraint may only be used as a last resort after other alternative measures have been tried prior to initiating the restraint;
 - (c) physical restraint must not result in harm or injury to the person, including restriction of blood circulation or breathing;
 - (d) any use of physical restraint must be for the shortest duration possible and must end as soon as it is determined that the emergency has ceased and the person's safety and the safety of others can be ensured.
- (3) Incident reporting must meet the requirements described in ARM Title 37, chapter 34, subchapter 15.
- (4) A behavior support plan, as described in ARM 37.34.1412, must be developed for the person if physical restraint is used three times in a three month period.
Nothing in this section limits or restricts the use of medically related restraints as defined in ARM 37.34.1404.

Authorizing statute(s): 53-6-402, 53-20-204, MCA

Implementing statute(s): 53-6-402, 53-20-203, MCA

37.34.1422 POSITIVE BEHAVIOR SUPPORT: RESTRICTED PROCEDURES

- (1) The following restricted procedures may be used for up to 90 calendar days as part of a behavior support plan that is developed in accordance with a person's Home and Community-Based Services (HCBS) health and safety modification and ARM 37.34.1412 and approved in accordance with (2):
 - (a) physically enforced contingent observation;

- {b}(a) contingent access to personal possessions;
- {c}(b) contingent access to personal funds;
- (c) contingent access to technology and technology devices, not to include communication devices;
- (d) educational fines;
- (e) physically enforced exclusion time out;
- (f) physically enforced overcorrection;
- (g) physically enforced positive practice overcorrection;
- (h) physically enforced restitutive overcorrection;
- {i}(d) contingent access to social activities;
- (e) contingent access to specific community location(s); and
- {j}(f) response cost; and
- {k} physically enforced required relaxation.

(2) A behavior support plan that includes the use of restrictive procedures must be approved by:

- (a) a board-certified behavior analyst-doctoral (BCBA-D), board-certified behavior analyst (BCBA), or board-certified assistant behavior analyst (BCaBA) under the supervision of a BCBA-D or BCBA;
- (b) a family support specialist with an autism endorsement (FSS-AE);
- {c}(b) a person with an Institute for Applied Behavior Analysis (IABA) consultant certification or an Intermediate Applied Behavior Analysis (ABA) Professional; or
- {d}(c) a person with a degree in applied behavior analysis (ABA), psychology, or special education who has provided documentation of training and experience in the use of the principles of applied behavior analysis ABA as approved by the department in the habilitation of person(s) with developmental disabilities and the development of behavior support plans to the developmental disabilities program director.

(3) All professionals developing and approving behavior plans are encouraged to have additional training in principles of safety science and trauma informed care.

{3}(4) A copy of the behavior support plan incorporating restricted procedures as listed in (1) must be sent to the developmental disabilities program director DDP bureau chief or their designee within three working days after approval as required in (2).

~~(4)(5) The developmental disabilities program director DDP bureau chief or their designee must provide prior written authorization for the continued use of the restricted procedures after 90 calendar days, and the department designee The designee(s) may take the form of a program review committee which is responsible for reviewing and monitoring the continued implementation and effectiveness of the behavior support plan. A behavior support plan incorporating restricted procedures must be reviewed at least once per year by the DDP program review committee.~~

(a) Program review committees:

- (i) have at least three members;
- (ii) meet at least once per month; and
- (iii) can be composed of, but are not limited to psychiatrist(s), psychologist(s), board certified behavior analyst(s), provider representative(s), regional representative(s), a developmental disabilities program central office representative, a targeted case manager (TCM), a representative of Disability Rights Montana (DRM), parent/family representatives, or members currently receiving services with or without restrictions.

~~(5)(6) The restricted procedures in (1) may only be used in the delivery of services to a person as authorized by these rules.~~

Authorizing statute(s): 53-6-402, 53-20-204, MCA

Implementing statute(s): 53-6-402, 53-20-203, MCA

REPEAL

The rule proposed to be repealed is as follows:

37.34.1405 POSITIVE BEHAVIOR SUPPORT: DESCRIPTION

Authorizing statute(s): 53-6-402, 53-20-204, MCA

Implementing statute(s): 53-6-402, 53-20-203, MCA

Reasonable Necessity Statement

The Department of Public Health and Human Services (department) is proposing to amend ARM 37.34.1401, 37.34.1402, 37.34.1404, 37.34.1411, 37.34.1412, 37.34.1418, 37.34.1420, 37.34.1422, and repeal ARM 37.34.1405, pertaining to Positive Behavior Support.

The Regulatory Reform Initiative (RRI) requires the department to enhance the consistency and efficiency of administrative rules. Senate Bill (SB) 5 similarly directs the Developmental Disabilities Program (DDP) to enhance consistency and efficiency. The SB 5 group was formed to meet the goals of Senate Bill 5, which aligns with the goals of the RRI. The SB 5 group has advised DDP that its Positive Behavior Support Systems rules should be amended to align with the federal Home and Community-Based Services (HCBS) Settings Rule, 42 CFR Parts 430, 431, 435, 436, 440, 441, and 447. The HCBS Settings Rule addresses several sections of Medicaid law under which states may use Medicaid funds to pay for HCBS.

Additionally, some of the terms in the above-listed rules also need to be updated to reflect terms used in the DDP's current 0208 Comprehensive HCBS Waiver. One of these changes is changing "Positive Behavior Supports" to "Behavior Supports."

ARM 37.34.1401

The rule uses the term "Positive Behavior Supports" which the department proposes to change to "Behavior Supports." The rule also prohibits seclusion, abusive, and demeaning procedures set forth in ARM 37.34.1418, but it does not reference this rule, which the department proposes to add. The department also proposes amending this rule to reflect current terminology and to reference appropriate rules.

ARM 37.34.1402

The rule refers to providers contracting with the department. However, DDP has transitioned to a provider enrollment process and uses the term "DDP qualified service provider" in DDP's current 0208 Comprehensive HCBS waiver program. Accordingly, the department proposes to amend this rule to reflect this terminology and the shift from individual contracts with DDP providers to a provider enrollment process.

ARM 37.34.1404

The rule defines terms applicable to Behavior Supports, but some of the definitions are inconsistent with the utilization of such terms in DDP's recently updated Incident Management Manual. Accordingly, the department proposes to update the terms "medically related restraint" and "safety device" to be consistent with DDP's Incident Management Manual. Additionally, the department proposes adding the following definitions recommended by the SB 5 group for clarity: "chemical restraint," "coercion," "safety science," "therapeutic care," and "trauma informed care."

ARM 37.34.1405

The rule offers a description of the Positive Behavior Supports services. Based on the advice of the SB 5 group, the department proposes to repeal the rule as unnecessary and duplicative. The important provisions and requirements are repeated in ARM 37.34.1401, 37.34.1402, and 37.34.1412.

ARM 37.34.1411

The rule uses the term “functional behavior assessment”; the department proposes to replace it with the term “behavior assessment.” The SB 5 group also advised DDP that the information that the assessment requires needed to be updated. Accordingly, the department proposes to update outdated terminology and to update the list of information the behavior assessment must include to be more succinct.

ARM 37.34.1412

The rule uses the term “functional behavior assessment,” which the department proposes to change to “behavior assessment.” The SB 5 group advised DDP that the information that the Behavior Support Plan must include should be updated. The department proposes to update the outdated terminology and to update the list of required information for completing the Behavior Support Plan to be more succinct and clear. In addition, the rule currently references ARM 37.34.1420(4). However, the department proposes to substantially change ARM 37.34.1420(4), such that this reference is no longer accurate; the department, thus, proposes to remove the cross-reference in this rule.

ARM 37.34.1418

This rule establishes prohibitions against certain practices or restrictions. The SB 5 group recommended expanding this list to include prohibitions against the restriction of therapeutic care, voting rights, grievance processes, corporal punishment, verbal or physical abuse, exclusion time, physical restraint, mechanical restraint, chemical restraint, physical enforcement, restitutonal overcorrection, seclusion, and coercion. The department considered the recommendations and, accordingly, proposes to amend this rule to include such prohibitions.

ARM 37.34.1420

This rule establishes guidelines for the use of physical restraints during authorized emergency procedures. The SB 5 group recommended including language to say physical restraint:

1. may only be used as a last resort,
2. must not result in harm or injury, and
3. must be for the shortest duration possible.

The SB 5 group also recommended adding documentation requirements for incident reporting when physical restraints are used. The department proposes to amend this rule to include the recommended language.

ARM 37.34.1422

The rule allows certain restricted procedures to be used for up to 90 calendar days as a part of a behavior support plan in accordance with ARM 37.34.1412 and approved in accordance with the requirements and conditions associated with contingent access to personal possessions, contingent access to personal funds, contingent access to social activities, and response cost. The SB 5 group recommended adding contingent access to technology and specific community locations as well as removing physically enforced contingencies as these are prohibited restraints. The department proposes to amend this rule in accordance with these recommendations, as well as address who must approve these restrictive procedures.

Fiscal Impact

The department does not anticipate a fiscal impact.

Interested Persons

The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the department. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be emailed, mailed or otherwise delivered to the contact person above.

Bill Sponsor Notification

The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Small Business Impact

Pursuant to 2-4-111, MCA, the department has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

Medicaid Performance-Based Statement

Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides

that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

Rule Reviewer

Olivia Schuler

Approval

Charles T. Brereton, Director
Department of Public Health and Human Services



DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF PROPOSED RULEMAKING

MAR NOTICE NO. 2025-522.1

Summary

Amendment of ARM 37.40.830 pertaining to Hospice Reimbursement

Hearing Date and Time

Monday, May 19, 2025, at 10:00 a.m.

Virtual Hearing Information

Join Zoom Meeting

<https://mt-gov.zoom.us/j/84517576036?pwd=8wemUsdYgKcrShwDzbm0JKF1qx0WoS.1>

Meeting ID: 845 1757 6036 and Password: 994617

Dial by Telephone +1 646 558 8656, Meeting ID: 845 1757 6036 and Password: 994617

Find your local number: <https://mt-gov.zoom.us/u/kd84KlxMWy>

Comments

Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted using the contact information listed below. Comments must be received by Friday, May 23, 2025, at 5:00 p.m.

Accommodations

The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. Requests must be made by Monday, May 5, 2025, at 5:00 p.m.

Contact

Bailey Yuhas
(406) 444-4094
hhsadminrules@mt.gov
Fax: (406) 444-9744

Rulemaking Actions

AMEND

The rule proposed to be amended is as follows, stricken matter interlined, new matter underlined:

37.40.830 HOSPICE, REIMBURSEMENT

- (1) Medicaid payment for covered hospice care will be made in accordance with the specific categories of covered hospice care and the payment amounts and procedures established by Medicare under 42 CFR 418.301 through 418.312. The specific categories of covered hospice care include:
 - (a) routine home care day;
 - (b) continuous home care day;
 - (c) inpatient respite care day;
 - (d) general inpatient care day; and
 - (e) service intensity add-on.
- (2) Hospice Routine Home Care (RHC) level of care days will be paid at one of two RHC rates. RHC per-diem payment rates for the RHC level of care will be paid depending on the timing of the day within the patient's episode of care. Days 1 through 60 will be paid at the RHC "High" rate while all other days will be paid at the RHC "Low" rate.
- (3) The room and board rate to be paid a hospice for a Medicaid beneficiary who resides in a nursing facility will be the Medicaid rate established by the department

in ARM 37.40.307 for the individual facility minus the amount the beneficiary pays toward their own cost of care. Payment for room and board will be made to the hospice and, in turn, the hospice will reimburse the nursing facility. General inpatient care or hospice respite care in a nursing facility will not be reimbursed directly by the Medicaid program when a Medicaid recipient elects the hospice benefit payment. Under such circumstances payment will be made to the hospice in accordance with this rule.

- (a) In this context, the term "room and board" includes performance of personal care services, including assistance in the activities of daily living, socializing activities, administration of medication, maintaining the cleanliness of a resident's room, and supervision and assisting in the use of durable medical equipment and prescribed therapies.
- (4) The following services performed by hospice physicians are included in the rates described in (1)(a) through (1)(d):
 - (a) general supervisory services of the medical director; and
 - (b) participation in the establishment of plans of care, supervision of care and services, periodic review and updating of plans of care, and establishment of governing policies by the physician member of the interdisciplinary group.
- (5) For services not described in (4), Medicaid will pay the hospice for those physician services furnished by hospice employees or under arrangements with the hospice in accordance with ARM 37.86.101, 37.86.104, and 37.86.105. Reimbursement for these physician services is included in the amount subject to the hospice limit described in (6). Services furnished voluntarily by physicians are not reimbursable.
- (6) Services of the patient's attending physician, if he or she is not an employee of the hospice or providing services under arrangements with the hospice, are not considered hospice services and are not included in the amount subject to the hospice payment limit.
- (7) Medicaid reimbursement to a hospice in a cap period is limited to a cap amount established using Medicare principles.
- (8) The department will notify the hospice of the determination of program reimbursement at the end of the cap year.
- (9) Payments made to a hospice during a cap period that exceed the cap amount are overpayments and must be refunded.
- (10) The department adopts and incorporates by reference the Hospice Rates FFY24²⁵ fee schedule, effective October 1, 2023 2024. Copies of the department's current fee schedules are posted at <http://medicaidprovider.mt.gov> and may be obtained from the Department of Public Health and Human Services, Senior and Long Term Care Division, P.O. Box 4210, Helena, MT 59604-4210.

Authorizing statute(s): 53-6-113, MCA

Implementing statute(s): 53-6-101, MCA

Reasonable Necessity Statement

The Department of Public Health and Human Services (department) proposes to amend ARM 37.40.830 to update the Medicaid hospice reimbursement fee schedule, effective October 1, 2024. This new fee schedule is being proposed in accordance with changes in federal hospice reimbursement rates set by the Centers for Medicare & Medicaid Services (CMS) under the final Medicare hospice rule published on August 6, 2024, and effective October 1, 2024. 89 FR 64202 (Aug. 6, 2024).

The proposed fee schedule implements an approximate, aggregate reimbursement rate increase of 2.9%, as computed and published by CMS, which will apply to providers in all 56 counties. Medicare hospice rates for Montana providers are also affected by a wage index applied geographically by county. The 2025 wage index has increased for Carbon, Stillwater, Golden Valley, and Yellowstone Counties by approximately 4%. The wage index for Cascade County has increased by 9%. Missoula County's wage index has increased by approximately 0.4%. In addition, the fiscal year (FY) 2025 wage index shows Lewis and Clark, Jefferson, Broadwater, and Gallatin Counties are now considered urban areas versus their previous status as rural areas under the FY 2024 wage index. Gallatin County will experience an increase in the wage index of approximately 16%, and Lewis and Clark, Broadwater, and Jefferson Counties will experience a decrease in the wage index of approximately 0.03%. The remainder of the Montana counties are subject to the rural index rate which increased by approximately 7%. Two hospice providers will see a hospice reimbursement rate decrease for failure to comply with the federal quality data submission requirements during the prior fiscal year. A copy of the proposed hospice fee schedule can be found at <https://medicaidprovider.mt.gov/proposedfs>.

The proposed rule amendment is necessary to pay Medicaid providers according to the current Medicare fee schedule effective October 1, 2024. Failure to amend the rule will result in a deficient state hospice reimbursement rate from the current federal rate, which would result in underpayment to hospice providers and introduce an inability for the state to comply with federal requirements pertaining to hospice providers.

Fiscal Impact

The proposed rule amendment will have a fiscal impact on the Hospice program. Funds impacted will be from federal Medicaid fund source (03585) and general fund source (01100). The projected budget for FY 2025 is \$3.6 million, which reflects an increase of 5.8% from the FY 2024 projected budget of \$3.4 million.

In FY 2024, approximately 204 Medicaid recipients received the hospice benefit. The majority of the Medicaid hospice program's budget provides reimbursement for hospice services provided in nursing facilities in the form of room and board for inpatient nursing facility hospice.

Effective Date

The department intends to apply the increase in hospice rates retroactively to claims for services provided on or after October 1, 2024. Any decreases in hospice rates would not be applied retroactively, but would be effective for claims for services provided on or after the adoption of the amendments proposed in this rulemaking notice.

Interested Persons

The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person listed in this notice.

Bill Sponsor Notification

The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Small Business Impact

Pursuant to 2-4-111, MCA, the department has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

Medicaid Performance-Based Statement

Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

Rule Reviewer

Robert Lishman

Approval

Charles T. Brereton, Director
Department of Public Health and Human Services



MONTANA
ADMINISTRATIVE
REGISTER



**BOARD OF HORSE RACING
DEPARTMENT OF COMMERCE**

NOTICE OF ADOPTION

MAR NOTICE NO. 2025-89.2

Summary

Amendment of ARM 8.22.2402, 8.22.2903, 8.22.2905, 8.22.2909, 8.22.3001, 8.22.3004, 8.22.3006, and 8.22.3201 pertaining to the Board of Horse Racing

Previous Notice(s) and Hearing Information

On March 7, 2025, the Board of Horse Racing published MAR Notice No. 2025-89.1 pertaining to the public hearing on the proposed amendment of the above-stated rules in the 2025 Montana Administrative Register, Issue Number 5.

Final Rulemaking Action – Effective April 26, 2025

AMEND AS PROPOSED

The agency has amended the following rules as proposed:

8.22.2402 DEFINITIONS

8.22.2903 EXERCISE PERSONS

8.22.2905 JOCKEYS

8.22.2909 PONY PERSONS

8.22.3001 GENERAL REQUIREMENTS

8.22.3004 CLAIMING

8.22.3006 PADDOCK TO POST

8.22.3201 GENERAL RULES

Statement of Reasons

No comments were received.

Contact

Jada Maynor
(406) 841-2596
jada.maynor@mt.gov
Montana Relay: 711

Rule Reviewer

Tori Koch

Approval

Mandy Rambo, Deputy Director

Approval

John Hayes, Chair, Board of Horse Racing



DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF ADOPTION

MAR NOTICE NO. 37-1072

Summary

Adoption of NEW RULES I through III and amendment of ARM 37.112.102, 37.112.103, 37.112.108, 37.112.116, 37.112.117, 37.112.121, 37.112.125, 37.112.129, 37.112.131, 37.112.132, 37.112.133, 37.112.137, 37.112.141, 37.112.142, 37.112.144, 37.112.147, 37.112.151, 37.112.152, 37.112.156, 37.112.157, 37.112.158, 37.112.163, 37.112.165, and 37.112.167 pertaining to Body Piercing and Tattooing

Previous Notice(s) and Hearing Information

On December 20, 2024, the Department of Public Health and Human Services published MAR Notice No. 37-1072 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 2584 of the 2024 Montana Administrative Register, Issue Number 24.

The public hearing was held on January 9, 2025.

Final Rulemaking Action – Effective April 26, 2025

ADOPT AS PROPOSED

The agency has adopted the following rules as proposed:

NEW RULE I (37.112.164) JEWELRY STANDARDS FOR INITIAL BODY PIERCINGS

NEW RULE II (37.112.160) BRANDING SAFETY AND SANITATION REQUIREMENTS

NEW RULE III (37.112.161) SCARIFICATION SAFETY AND SAFETY REQUIREMENTS

AMEND AS PROPOSED

The agency has amended the following rules as proposed:

37.112.102 PURPOSE

37.112.108 GENERAL FACILITY REQUIREMENTS

37.112.116 TOILETS AND HANDWASHING SINKS

37.112.125 EQUIPMENT AND SUPPLIES

37.112.129 BLOOD-BORNE PATHOGEN EXPOSURE CONTROL

37.112.131 STERILIZATION OF EQUIPMENT AND JEWELRY

37.112.137 HANDLING AND DISPOSAL OF INFECTIOUS MATERIAL

37.112.141 RECORD KEEPING AND REVIEW

37.112.142 CLIENT RECORD

37.112.144 CONSENT FORM

37.112.147 TRAINING

37.112.151 LICENSE APPLICATION

37.112.152 LICENSE FEE AND EXPIRATION

37.112.157 INSPECTION

37.112.158 RESTRICTIONS AND PROHIBITIONS

37.112.163 TATTOOING: COLORS, DYES, AND PIGMENTS

37.112.167 BODY PIERCING: EAR LOBE PIERCING EXEMPTIONS

AMEND WITH CHANGES

The department has amended the following rules with the following changes from the original proposal, stricken matter interlined, new matter underlined:

37.112.103 DEFINITIONS

In addition to the definitions contained in 50-48-102, MCA, the following definitions apply to this subchapter:

- (1) "Aftercare instructions" means verbal and written instructions that the client should follow to prevent infection and promote healing of the skin after receiving a body art procedure.
- (2) "Antiseptic" means a product that is labeled as useful in preventing diseases caused by microorganisms present on the skin and/or on mucosal surfaces of humans. This includes products meant to kill germs and/or labeled as "antiseptic," "antimicrobial," "antibacterial," "microbicide," "germicide," or other similar terms.
- (3) "Aseptic technique" means a procedure that prevents contamination of any object or person.
- (4) "Autoclave" means a device that is intended for use by a user to sterilize products by means of pressurized steam. This device must comply with one of three types of steam programs defined as B, N, and S by standard EN13060, ISO 17665.
- (5) "Automated instrument washer" means a mechanical washer designed specifically for the decontamination of instruments prior to sterilization. These devices must comply with ISO 158831/2.
- (6) "Blood-borne pathogens" means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include hepatitis B virus (HBV), hepatitis C virus (HCV), and human immunodeficiency virus (HIV).
- (7) "Body art" means body piercing and tattooing. The term includes ear lobe piercing, branding and scarification.
- (8) "Body artist" means ~~any person aged 18 or older~~ a person performing body art services.
- (9) "Body modification" is the intentional altering of the human body for any nonmedical reason.
- (10) "Branding" means the process in which a mark or marks are burned into human skin tissue with the intention of leaving a permanent mark.
- (11) "Cleaning room" means the room used to sterilize instruments and jewelry with an autoclave.
- (12) "Client" means an individual on whom a body artist performs a body art procedure.
- (13) "Contaminated" means the probable presence of blood or other potentially infectious materials on an item or surface.
- (14) "Disinfectant" means a substance or solution, registered with the United States Environmental Protection Agency (EPA), which kills or inactivates viruses and pathogenic microorganisms, but not necessarily their spores.

- (15) "Ear lobe piercing" means the puncturing of the ear lobe, but not the ear cartilage, to create a permanent hole for cosmetic purposes.
- (16) "Easily cleanable" means a characteristic of a surface that allows effective removal of soil by normal cleaning methods.
- (17) "Equipment" means all machinery, including fixtures, containers, vessels, instruments, tools, devices, implements, furniture, display and storage areas, sinks, and all other apparatus and appurtenances used in connection with the operation of an establishment.
- (18) "Implant" means any transdermal or subdermal object that is embedded into a person's body. Implants do not include microdermal anchors or two-point piercings.
- (19) "Infectious waste" has the meaning provided for in 75-10-1003, MCA.
- (20) "Ink cup" means a small container for an individual portion of pigment which may be installed in a holder or palette, and in which a small amount of pigment is placed.
- (21) "Instrument" means a hand piece, needle, and any other tool that may come in contact with a client's body or be exposed to blood or body fluids during a body art procedure.
- (22) "Jewelry" means any biocompatible object that is worn through a body piercing.
- (23) "Material certificate" means all documents intended to state the specifics of a material used for body jewelry. Names for these documents include but are not limited to mill certificates, material certificates, metal composition sheets, MSD, and material certification sheets.
- (24) "Microdermal anchor" means a piece of jewelry used for single-point piercings that has a foot no larger than 8mm in length.
- (25) "Mobile establishment" means a licensed facility where body art is conducted, utilizing a wheeled vehicle for movement from place to place.
- (26) "Operator" means any owner of an establishment or any person who is responsible for the establishment as well as the other body artists working at the establishment, for the purpose of meeting the requirements of this chapter.
- (27) "Permanent cosmetics" means a tattoo, whether permanent or semipermanent, which is applied to a body part, including eyebrows, eyelids, lips, and other parts of the body for beauty marks, hair imitation, lash enhancement, or areola repigmentation. This term also includes procedures commonly referred to as permanent makeup, micropigmentation, micropigment implantation, microblading, dermagraphics, cosmetic tattooing, and other similar types of procedures.

- (28) "Physician" means a person licensed to practice medicine in Montana by the Montana Board of Medical Examiners under the Department of Labor and Industry.
- (29) "Piercing gun" means a device approved by the department that pierces an individual's ear lobe using a single-use stud and clasp ear piercing system.
- (30) "Sanitization" means the effective treatment of surfaces of inanimate objects by a product registered by the EPA that provides a sufficient concentration of chemicals and enough time to reduce the bacterial count, including pathogens, to a safe level.
- (31) "Scarification" means the process in which a mark or marks are cut into human skin tissue with the intention of leaving a permanent mark.
- (32) "Sharps" means any discarded instrument or article that may be contaminated with blood or other bodily fluid and may cause punctures or cuts, including needles, scalpel blades, uncovered razors, and broken glass. A disposable shaving razor with protective cap in place is not considered a sharp.
- (33) "Single-point piercing" means a piercing that creates a hole in the skin that acts as both the entry and exit for a microdermal or transdermal anchor.
- (34) "Single-use" means products or items that are intended for one-time, one-person use and that are disposed of after use on a client, including cotton swabs or cotton balls, tissues or paper products, paper or plastic cups, gauze and sanitary coverings, razors, needles, scalpel blades, stencils, ink cups, and protective gloves.
- (35) "Sterilize" means to treat an object or surface with a procedure that kills or irreversibly inactivates all microorganisms, including bacteria, viruses, and pathogenic fungi, including their spores.
- (36) "Strike branding" means the process by which a mark is burned with heated metal into the tissue of a person.
- (37) "Subdermal object" means an item that is implanted under the skin.
- (38) "Tattooist" means a person who engages in the practice of tattooing.
- (39) "Temporary establishment" means a facility where body art is conducted for not more than 14 days at one location in a calendar year.
- (40) "Transdermal anchor" means a piece of jewelry used for single-point piercings that has a foot larger than 8mm in length.
- (41) "Transdermal object" means an item that is passed, entered, or made by penetration through the skin. Transdermal objects do not include microdermal anchors.
- (42) "Two-point piercing" means a piercing that punctures the skin creating a distinct entry and exit point.

- (43) "Ultrasonic unit" means a device that removes debris by a process called cavitation, in which waves of acoustic energy are propagated in aqueous solutions to disrupt the bonds that hold particulate matter to surfaces.
- (44) "Universal precautions" means the current set of guidelines and controls published by the U.S. Centers for Disease Control and Prevention that includes specific recommendations for the use of protective equipment such as gloves, masks, or protective eye wear whenever contact with blood or body fluids containing blood is anticipated.
- (45) "Work room" means a designated room or area in which body art takes place. The work room includes the client chair or table, counter, mayo stand, instrument tray, storage drawer, and body artist's chair.

Authorizing statute(s): 50-48-103, MCA

Implementing statute(s): 50-48-102, 50-48-103, MCA

37.112.117 WORK ROOM REQUIREMENTS

- (1) All body art procedures must take place in the work room only.
- (2) The work room must be separated by a barrier from the waiting area. The room does not need to have complete physical separation, but it must be segregated by counters, self-closing doors, or other barriers so that clients or other employees may not enter the work room unless they open the barrier to gain access.
- (3) The work room may not be used as a corridor for access to other rooms.
- (4) Animals are not allowed in the establishment work room, except for:
 - (a) patrol dogs accompanying security or police officers law enforcement;
 - (b) and service animals such as guide dogs; and-
 - (c) aquatic species within ~~F~~fish aquariums are allowed located in waiting rooms and areas outside of the work room provided that the aquatic species can survive underwater for a minimum of 48 hours. ~~Fish aquariums may contain only aquatic species that can survive underwater for a minimum of 48 hours.~~
- (5) The work room must have a minimum of 50 foot-candles of light measured at the level where the procedure is implemented. Spot lighting may be used to achieve this degree of illumination.

- (6) The work room must have adequate ventilation.
- (7) Openings to the outside must be protected by such means as self-closing doors, screened or closed windows, or air currents to protect against the entrance of insects, rodents, or other animals. Screening material must not be less than 16 mesh to the inch.
- (8) Work rooms must have at least one handwashing sink unless there is a handwashing sink outside the work room within ten feet of the work room door.
 - (a) If any client chair is more than fifteen feet from a handwashing sink, additional sinks may be required within the work room.
 - (b) If the handwashing sink is outside the work room, the work room door must be have a two-way self-closing door. The two-way self-closing door may be a solid door, swinging café door, or curtain.
 - (c) The handwashing sink cannot be in the same room as the toilet.
 - (d) If controls for wrist or foot activation are not available, single service towels must be used for turning controls off after washing hands.
 - (e) The handwashing sink must be sanitized with an EPA-certified disinfectant at least once at the beginning of each day while the establishment is in operation.
 - (f) The handwashing sink must be provided with hot and cold running water by means of a mixing valve or combination faucet, except as provided in ARM 37.112.121(2) regarding temporary or mobile establishments.
 - (g) Any self-dispensing, slow-closing, or metering faucet used must be designed to provide a flow of water for at least 20 seconds without the need to reactivate the faucet.
 - (h) Steam mixing valves are prohibited.
 - (i) Soap must be conveniently located near the handwashing sink.
 - (j) Individual, disposable towels must be conveniently located for drying hands.
- (9) The work room must have a sufficient number of waste receptacles for the disposal of waste materials.
 - (a) Waste receptacles must be lined and covered. The receptacles must be cleanable, kept clean, and have self-closing lids with hands-free controls.
 - (b) Waste receptacles in the work room must be emptied daily or more often, as needed.

- (c) A dedicated container for the disposal of sharps and a dedicated container for other contaminated waste must be located in the work room in accordance with ARM 37.112.137 for disposal of infectious material.
- (10) The work room must be maintained in a clean condition.
- (11) The floor of the work room must be constructed of smooth and impervious materials that are easily cleanable and in good condition. The floor must be wet-mopped daily.
- (12) Except as provided in (12)(a), ~~T~~tobacco use, vaping, eating, or and drinking is are prohibited in the work room, except where body art preparations and procedures are performed and any location where instruments or supplies are stored or cleaned.
 - (a) Eating and drinking is allowed when needed for first aid purposes. The use of bottled water and covered drinks is allowed. Hands must be washed and body artists must use a new pair of gloves before returning to the procedure area.

Authorizing statute(s): 50-48-103, MCA

Implementing statute(s): 50-48-103, MCA

37.112.121 TEMPORARY OR MOBILE ESTABLISHMENT

- (1) A temporary or mobile establishment may be operated if:
 - (a) the operator submits to the department or its designee a written plan that demonstrates how the temporary or mobile establishment will meet the provisions of these rules, or will use alternatives that provide equivalent protection as provided by these rules; and
 - (b) the department or its designee issues written approval of the plan.
- (2) A temporary or mobile establishment that cannot provide mechanically heated water may provide temperate water for hand washing as long as the water is provided in a system that is constructed and operated in accordance with applicable state and local laws for potable water.
- (3) A temporary or mobile establishment that cannot meet ARM 37.112.115(1) regarding sewage systems may use an acceptable portable toilet unit with final waste disposal that complies with applicable state and local laws.

- (4) Mobile establishments, such as a trailer, mobile home, or mobile vehicle, must have four solid walls. Outdoor tents are prohibited.
- (5) Mobile establishments must be equipped with a gravity or pressurized water storage tank. The water storage tank, or tanks, shall be sufficient capacity to meet the peak water demands of the body art establishment.
 - (a) Mobile establishments using disposable equipment only must have a water storage tank, or tanks, with a capacity of at least 38 liters (10 gallons) for handwashing.
 - (b) Mobile establishments that reuse equipment must have a water storage tank, or tanks, with a capacity of at least 151 liters (40 gallons) for handwashing, equipment washing, and sanitizing purposes.
- (5)(6) The venue for a temporary event must be approved by the department or local health authority prior to the event. The venue must be indoors and meet all requirements of ARM 37.112.117.
- (6)(7) Temporary or mobile establishments must be used solely for the purpose of body art procedures. Food prep and habitation are prohibited.
- (7)(8) The use of an autoclave is prohibited in temporary or mobile establishments. All equipment must be individually wrapped and sterile or sterilized at the time of use with a cassette sterilization unit. Mobile and temporary establishments must properly sterilize instruments and provide evidence of a spore test performed on sterilization equipment no later than 30 days prior to the date of the event. Otherwise only single-use, prepackaged, sterilized instruments marked with an expiration date, lot number, and method of sterilization can be used. A clean room is required if equipment is reusable, cleaned and sanitized.

Authorizing statute(s): 50-48-103, MCA

Implementing statute(s): 50-48-103, MCA

37.112.132 CLEANING AND ULTRASONIC USE

- (1) All reusable instruments used for body art procedures must be cleaned thoroughly with an appropriate soap or detergent and rinsed completely with potable water.
- (2) Establishments that reuse instruments must have at least a one-compartment sink with hot and cold running water for the cleaning of instruments or an automated instrument washer. The sink must be used only for cleaning contaminated instruments and shall not be used for hand washing. The sink must be of an

adequate size to submerge the instruments being cleaned, except as provided in (3).

- (3) Establishments that use ultrasonic units with heating elements to clean their instruments are not required to have hot water at the cleaning sink, provided the heating elements can heat the cleaning solution and maintain the temperature according to the manufacturer's specifications.
- (4) An ultrasonic unit must be used in accordance with the manufacturer's instructions. An ultrasonic unit does not satisfy the sterilization requirements in ARM 37.112.131, with or without the addition of chemical sanitizers.
- (5) Ultrasonic unit use, cleaning, dusting, or vacuuming is prohibited during times when clients are being tattooed or pierced.
- (6) The covered ultrasonic unit and the sink used for rinsing and scrubbing contaminated tools must be separated from the autoclave to prevent contamination. If space is an issue, the establishment may install a Plexiglas, stainless steel, or other nonporous barrier to prevent cross contamination.
- (7) Except as provided in (8), All reusable instruments must be cleaned in a separate cleaning room.
 - (a) The cleaning room must be enclosed by four solid walls except for windows and doors and not open to the public.
 - (b) The cleaning room must only be used for cleaning, disinfecting, sterilizing, storage, and related tasks. No other services, including tattooing, piercing, or retail sales, may occur within this sterilization room/area.
 - (c) If any items are stored in the cleaning room, cabinets or drawers must be made of smooth, nonporous wipeable materials.
- (8) Reusable tattoo machines and ear-piercing guns must be cleaned in accordance with manufacturer instructions and guidelines.

Authorizing statute(s): 50-48-103, MCA

Implementing statute(s): 50-48-103, MCA

37.112.133 SKIN PREPARATION, ASEPTIC TECHNIQUE, AND AFTERCARE

- (1) Aftercare instructions appropriate for the body art procedure that describe effective means of infection prevention must be provided to the client both verbally and in writing before every procedure.

- (2) At all times during the body art procedure, body artists must use sterile instruments as specified in ARM 37.112.131 and aseptic techniques.
- (3) Before performing the body art procedure, body artists must remove all rings, watches, and bracelets, and before and after performing the body art procedure, a body artist must thoroughly wash their hands, wrists, and lower arms in warm running water with soap for at least 20 seconds, scrubbing around and under their fingernails, rinsing completely, drying with clean, individual, disposable towels, and use a new clean disposable towel to turn off the faucet.
- (4) Body artists must wear a clean outer garment. A hair restraint must be worn if necessary to prevent the body artist's hair from contact with the client. All necklaces, bracelets, or other personal items of the body artist that could come in contact with the client must be removed ~~to prevent the item coming in contact with the client~~.
- (5) If it is necessary to shave the client's skin, the body artist must use single-use razors. Straight razors, electric razors, and replaceable blade units may not be used. After shaving the client's skin, the body artist must:
 - (a) wash and scrub their hands as described in (3); and
 - (b) wash and rinse the client's area of skin that was shaved.
- (6) ~~If the A body artist wore must wear gloves when to washing or shaving shave the client's skin. Following washing or shaving of the client's skin, the body artist must discard those gloves after completing those tasks. The body artist must then remove the gloves, wash hands, and put on a new pair of gloves before continuing the body art procedure.~~
- (7) Before performing the body art procedure, the skin and surrounding area where the procedure is to be done must be thoroughly dampened with an antiseptic using a clean single-use cotton ball, gauze, or tissue.
- (8) If it is necessary to use a marking device, the marking device will be used only once and disposed of.
- (9) New gloves must be put on before each body art procedure.
- (10) If the body artist's gloved hands become contaminated during the body art procedure, then the body artist must remove the gloves, wash hands, and put on a new pair of gloves before resuming the procedure.
 - (a) Inadvertent contamination of gloved hands may include touching eyes, nose or mouth, answering the phone, opening a door, or retrieving an item from the floor.
 - (b) If the body artist sustains a needle stick, the body artist must resume the body art procedure with clean and sterile equipment after rewashing hands

and regloving. If a needle stick occurs, the department recommends consulting a health care provider.

(11) ~~In the event of blood flow, all materials used to stop the flow of blood or to absorb blood must be sterile and single-use.~~

(12)(11) Upon completion of the body art procedure, body artists must apply an antiseptic solution to the procedure area in accordance with the manufacturer's instructions with a clean single-use cotton ball, gauze, or tissue. In the event of bleeding, all products used to stop the flow of blood or to absorb blood must be sterile, single-use items that are disposed of immediately after use in appropriate covered containers. All products used to cover the procedure site must be used in accordance with the manufacturer's instructions.

Authorizing statute(s): 50-48-103, MCA

Implementing statute(s): 50-48-103, MCA

37.112.156 REVIEW OF PLANS

- (1) Whenever an initial license is applied for, the license applicant must submit properly prepared plans and specifications to the department or its designee for review and approval before construction, remodeling, or conversion begins.
- (2) For initial plan reviews submitted to the department, the initial plan review fee is \$200 and must be submitted by the applicant before the plan review will begin. A local board of health may establish its own fee for plans that are submitted to the local health authority for review.
- (3) The plans and specifications must demonstrate how the establishment will meet the requirements of this rule, including the following:
 - (a) a layout of work rooms, waiting areas, auxiliary rooms, toilet rooms, handwashing facilities, doorways, stairways, fixed equipment, and facilities;
 - (b) specifications for any autoclave that may be used, including manufacturer and model number;
 - (c) copies of the client consent form and client record form; and
 - (d) copies of formal training documentation as described in ARM 37.112.147.
- (4) If the department or its designee disapproves of the plans, the department or its designee will make the deficiencies known to the applicant.

- (5) If the facility was previously licensed or certified by the department as a body art establishment and no structural modification is involved, the department may waive the requirement for the submission of plans.
- (6) Changes in the client consent form and client record form must be submitted to the department or its designee before implementation.

Authorizing statute(s): 50-48-103, MCA

Implementing statute(s): 50-48-103, MCA

37.112.165 BODY PIERCING: ADDITIONAL REQUIREMENTS AND RESTRICTIONS

- (1) If the client is under the age of three, the client's parent or legal guardian must be given verbal and written warning of the inherent choking hazard of the jewelry before the body piercing. This warning may be included on the consent form.
- (2) Piercing guns may be used on the ear lobe only and shall not be used on body parts such as cartilage, nostrils, navels, eyebrows, and tongues.
- (3) For the purposes of this chapter, body piercing does not include the following:
 - (a) the practice of electrolysis as defined in ARM Title 37, chapter 31, subchapter 1 37-31-101, MCA;
 - (b) the practice of a physician or licensed medical professional as long as the person does not hold himself or herself out as a body artist;
 - (c) the practice of acupuncture;
 - (d) other types of body modifications, including cutting muscle to make a permanent split such as tongue-splitting, cutting into bone, trepanation (drilling into the skull), dental modification, amputation, implants, saline injection, vacuum pumping, circumcision, castration, penectomy, and subincision or superincision of genitals.

Authorizing statute(s): 50-48-103, MCA

Implementing statute(s): 50-48-103, MCA

Correction of Clerical Error

During internal review following the end of the public comment period, a clerical error was discovered in the current rule text under ARM 37.112.165(2)(a), adopted as (3)(a). The rule provides that body piercing does not include the practice of electrology “as defined in ARM Title 37, chapter 31, subchapter 1.” The reference to ARM Title 37, chapter 31, subchapter 1 is incorrect in that these referenced rules are unrelated to electrology. Electrology is defined under 37-31-101, MCA. The department has amended the rule to reference the statutory definition of electrology.

Statement of Reasons

The department has considered the comments and testimony received. A summary of the comments and/or testimony received, and the agency’s responses are as follows:

COMMENT #1: A commenter expressed support for the proposed rule changes.

RESPONSE #1: The department thanks the commenter for their support of the proposed rule changes

COMMENT #2: A commenter asked the following questions concerning the proposed rules:

- a. What body art establishments are licensed solely by local boards of health as referenced in ARM 37.112.102?
- b. Does ARM 37.112.117(9)(a) require that waste receptacles be under hands free control and no longer allow them to remain open during tattooing?
- c. Does ARM 37.112.133(4) require body artists to remove of all jewelry and personal items or just personal items and jewelry that could come into contact with the client?
- d. Does ARM 37.112.133(12) allow the use of bandages that are absorbent, but not sterile?

The commenter also suggested ARM 37.112.133(6) be revised to make clear whether the use of gloves is optional or required when a body artist washes or shaves the client’s skin.

RESPONSE #2: Under 50-48-203, MCA, a local board of health may implement its own licensure and regulatory program for tattooing and body-piercing establishments. If the local board of health implements such a program, the requirements cannot be less stringent than those set forth in the department’s body art rules and the program operates in lieu of the department’s licensure and regulatory program. ARM 37.112.117(9)(a) requires that waste receptacles in the

workroom have self-closing lids with hands-free control so they are not open during body art procedures. ARM 37.112.133(4) is intended to require the body artist remove only jewelry and other personal items that could come into contact with the client. The department has revised the rule for clarity. ARM 37.112.133(11) requires that all products, including bandages, applied in the event of bleeding be sterile. The department has revised ARM 37.112.133(6) to clarify that gloves must be used if the body artist is shaving or washing the client's skin.

COMMENT #3: A commenter sought clarification on whether ARM 37.112.133(6) is intended to make the use of gloves optional or required when a body artist washes or shaves the client's skin.

RESPONSE #3: Please see the response to comment #2.

COMMENT #4: A commenter sought clarification of whether the initial plan review fee under ARM 37.112.156(2) of \$200 for plan reviews submitted to the department also applies to plan reviews completed by a local board of health or whether local boards of health may continue to set the amount of the fee charged for plan reviews performed by a local health authority. The commenter noted that ARM 37.112.103 removes the definition of the term "department."

RESPONSE #4: The definition of "department" was removed from ARM 37.112.103 because the term is statutorily defined under 50-48-102, MCA. The rule as revised incorporates this statutory definition and the reference to "department" in ARM 37.112.156 means the Department of Public Health and Human Services. The \$200 plan review fee applies only to plan reviews submitted to the department. A local board of health may continue to set the amount of the fee, if any, they wish to charge for plan reviews performed by the local health authority. The department has revised the rule for clarity.

COMMENT #5: A commenter asked whether the \$200 fee for plan reviews submitted to the department allows local boards of health to charge a lesser amount for plan reviews submitted to them.

RESPONSE #5: Please see the response to comment #4.

COMMENT #6: A commenter sought clarification as to what contamination means under ARM 37.112.133(10).

RESPONSE #6: ARM 37.112.133(10)(a) provides that inadvertent contamination of gloved hands includes "touching eyes, nose or mouth, answering the phone, opening a door, or retrieving an item from the floor."

COMMENT #7: A commenter indicated the rules should be revised to provide for definitive separation between permanent cosmetics and tattooing.

RESPONSE #7: The department disagrees and believes that permanent cosmetics is a type of tattooing given the definition of tattooing under 50-48-102, MCA, which provides that “tattooing” means “making permanent marks on the skin of a live human being by puncturing the skin and inserting indelible colors. The term includes imparting permanent makeup on the skin such as a permanent lip coloring and permanent eyeliner.”

COMMENT #8: A commenter requested clarification as to the standards for hand washing and hand sanitizing under ARM 37.112.167.

RESPONSE #8: ARM 37.112.167 applies to establishments that perform ear lobe piercing through the use of an approved piercing gun only. The rule allows these types of establishments to use a 70% alcohol-based hand sanitizer in accordance with CDC guidelines if a handwashing sink is not in the workroom or within 10 feet of the workroom. All other body art establishments are required to have a handwashing sink within the work room or within 10 feet of the work room door. ARM 37.112.117(8).

COMMENT #9: A commenter expressed concern that ARM 37.112.117 does not allow for covered drinks or water bottles in the workroom and indicated their practice is to provide clients with bottled water to ensure they remain hydrated during procedures. The commenter requested the rule be revised to allow covered drinks in workrooms outside of the immediate work area provided that the body artist take off their gloves and washes their hands prior to handling any drink. The commenter also asked whether reporting under ARM 37.112.163 to the department of adverse client reactions is required to be made on a standard form or a form created by the establishment. The commenter also asked how long they would have to replace cabinets within a workroom that do not meet the requirement to be nonporous.

RESPONSE #9: The department has revised ARM 37.112.117(12) for clarity. There is not a standard form prescribed by the department to report adverse client reactions, and the establishment may use their own form to satisfy the reporting requirement. If the establishment has a clean room with cabinets, they are required to be of nonporous material and would need to be replaced if not so constructed. The establishment would need to work with county health department on the timeline for replacement.

COMMENT #10: A commenter inquired into the reason the rules are being revised and who requested the rule changes. The commenter questioned the need for the fee increase under ARM 37.112.152 and why fees are broken out separately for tattoo and body piercing licenses. The commenter expressed concern that questions asked during the hearing were not answered. The commenter also questioned what will be permitted with respect to scarification under NEW RULE III.

RESPONSE #10: The statement of reasonable necessity explains the department's reasoning for amending the rules, how the rule changes were developed, and the basis for the proposed increase in fees. Under the existing rules, there are three license types: tattooing, body

piercing, and ear lobe only piercing. No changes to these categories of licensure are being proposed as part of this rulemaking. Consistent with the requirements of the Montana Administrative Procedure Act, the department has responded through this adoption notice to the comments and questions presented during hearing. The term “scarification” used in NEW RULE III (ARM 37.112.161) is defined under ARM 37.112.103 and is limited to processes under which a mark or marks are cut into human skin tissue with the intention of leaving a permanent mark. ARM 37.112.165(2)(d) specifically excludes, as body piercing, procedures that involve cutting muscle to make a permanent split such as tongue-splitting.

COMMENT #11: A commenter suggested revising the definition of “body artist” in ARM 37.112.103 to remove language requiring the artist to be age 18 or older. The commenter noted the language is redundant to ARM 37.112.151(2).

RESPONSE #11: The department agrees and has revised the rule accordingly.

COMMENT #12: A commenter suggested revising ARM 37.112.117 to clarify whether allowing fish aquariums in waiting areas means all other animals other than fish are prohibited in waiting areas.

RESPONSE #12: The department has revised the rule for clarity.

COMMENT #13: A commenter suggested revising ARM 37.112.121 to establish specific water and wastewater requirements for mobile establishments to ensure these types of establishments have sufficient tank storage to protect public health.

RESPONSE #13: The department agrees with the suggestion and has revised the rule accordingly to add wastewater requirements that are modeled after the department’s mobile establishment retail food rule.

COMMENT #14: A commenter suggested that language under ARM 37.112.121 prohibiting temporary and mobile establishments from using autoclaves be removed. The commenter indicates these types of establishments can appropriately be outfitted with an autoclave and notes that prohibiting autoclaves is inconsistent with other rule language.

RESPONSE #14: The department agrees and has revised the rule accordingly.

COMMENT #15: A commenter suggested revising ARM 37.112.132(6) to use the term “automated instrument washer” instead of “ultrasonic unit” since not all automated washers are ultrasonic.

RESPONSE #15: The department disagrees. Ultrasonic units and automated washers are different pieces of equipment and are separately defined in ARM 37.112.103.

COMMENT #16: A commenter suggested revising ARM 37.112.132(7) to clarify if the cleaning room must be on the premises of the establishment or can be in a remote location. The commenter also requested clarification on whether tattoo machines and ear-piercing guns are considered “reusable instruments” under the rule.

RESPONSE #16: The department believes the rule makes clear that the cleaning room must be on the premises of the establishment given the requirement under ARM 37.112.132(2) for establishments that reuse instruments to have a one compartment sink or an automated instrument washer. The department has revised the rule to clarify requirements for the cleaning of tattoo machines and ear-piercing guns.

COMMENT #17: A commenter suggested revising ARM 37.112.132(7)(a) to clarify the meaning of the term “enclosed.”

RESPONSE #17: The department has revised the rule for clarity.

COMMENT #18: A commenter noted that the proposed revision to ARM 37.112.133(12) contains language that is redundant to language under (11). The commenter also suggested that ARM 37.112.133(11) be revised to add a requirement for disposing of sterile products into a covered container.

RESPONSE #18: The department has revised the rule to remove the redundant language. The requirement to dispose of sterile products into closed containers was proposed in the proposed amendment to ARM 37.112.133(12), which has been adopted as final in ARM 37.112.133(11).

Contact

Bailey Yuhas
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Rule Reviewer

Robert Lishman

Approval

Charles T. Brereton, Director
Department of Public Health and Human Services



DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF ADOPTION

MAR NOTICE NO. 37-1086

Summary

Amendment of ARM 37.40.1485 pertaining to Home and Community-Based Services for Elderly and Physically Disabled Persons: Environmental Accessibility

Previous Notice(s) and Hearing Information

On December 20, 2024, the Department of Public Health and Human Services published MAR Notice No. 37-1086 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2608 of the 2024 Montana Administrative Register, Issue Number 24.

A public hearing was held on January 9, 2025.

Final Rulemaking Action – Effective April 26, 2025

AMEND AS PROPOSED

The agency has amended the following rule as proposed:

37.40.1485 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: ENVIRONMENTAL ACCESSIBILITY ADAPTATION, REQUIREMENTS

Statement of Reasons

The department has considered the comments and testimony received. A summary of the comments received, and the agency's responses are as follows:

COMMENT #1: A commenter emphasized the importance of environmental accessibility adaptations and modifications for individuals receiving Big Sky Waiver (BSW) services. The commenter suggested revision of multiple unspecified administrative rules across each department waiver program for waiver services to be offered to individuals with disabilities who are eligible for Home and Community Based Services to account for individuals who have multiple or co-occurring disabilities. The commenter also expressed concern about implementation of the rule, including the availability of contractors familiar with the 2010 ADA standards and how multiple home modifications for members moving into new homes will be handled. Additionally, the commenter sought clarification on the “protections” available for members receiving temporary Big Sky Waiver slots and the duration contractors have to address issues that arise following installation of an environmental accessibility adaptation. The commenter expressed support for the rule’s allowance for only one bid under prior authorized services if a second contractor cannot be found.

RESPONSE #1: The department agrees with the commenter on the importance of environmental accessibility adaptations and modifications for individuals receiving BSW services. The suggestion to revise other unspecified rules governing department waiver programs is outside of the scope of this rulemaking. The 2010 ADA standards are nationally recognized standards that will help ensure that accessibility adaptations funded through BSW provide for the highest level of accessibility, promote independence, and enhance the quality of life for individuals who rely on the adaptations. The department believes contractors will be able to adhere to and follow these nationally recognized standards. If multiple modifications are needed, the department will review each adaptation individually to ensure it complies with requirements of the BSW program. Regarding concerns about protections available for members receiving temporary BSW slots, the same level of protection applies to members with both permanent and temporary slots. The department recognizes the importance of addressing issues that arise following installation of an environmental accessibility adaptation and is committed to addressing any issues promptly, to ensure the safety and functionality of the modifications for the member within the requirements of the BSW program.

Contact

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Rule Reviewer

Robert Lishman

Approval

Charles T. Brereton, Director
Department of Public Health and Human Services



DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF ADOPTION

MAR NOTICE NO. 37-1105

Summary

Amendment of ARM 37.34.1501 pertaining to Developmental Disabilities Program Incident Reporting and Handling

Previous Notice(s) and Hearing Information

On December 20, 2024, the Department of Public Health and Human Services published MAR Notice No. 37-1105 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2626 of the 2024 Montana Administrative Register, Issue Number 24.

A hearing was held on January 13, 2025.

Final Rulemaking Action – Effective April 26, 2025

AMEND AS PROPOSED

The department has amended the following rule as proposed:

37.34.1501 INCIDENT REPORTING AND HANDLING, PURPOSE

Statement of Reasons

The department has considered the comments and testimony received. A summary of the comments received, and the agency's responses are as follows:

COMMENT #1: One commenter asked that we clarify the time frames for the Targeted Case Manager (TCM) and/or Quality Improvement Specialist (QIS) to sign off on the Incident Reports (IRs).

RESPONSE #1: The department clarifies that the time frame for TCMs and/or QISs are not identified in the manual, because TCMs and/or QISs may review IRs multiple times, ask questions/seek clarification, or wait until the incident is resolved before signing off.

COMMENT #2: One commenter asked that we clarify who has access to DDP's Data Management System (DMS) and notification requirements.

RESPONSE #2: The department clarifies that the persons who have access to DDP's DMS are DDP state employees and members of the Waiver recipient's team, which includes the targeted case manager and provider staff. If the Waiver recipient has a legal representative, notifications will be made via phone call, email, text, or written form.

Contact

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Rule Reviewer

Olivia Schuler

Approval

Charles T. Brereton, Director
Department of Public Health and Human Services



DEPARTMENT OF PUBLIC SERVICE REGULATION

NOTICE OF ADOPTION

MAR NOTICE NO. 2025-14.2

Summary

Amendment of ARM 38.3.405 and 38.3.406 pertaining to the completion of protests to applications for motor carrier authority

Previous Notice(s) and Hearing Information

On March 7, 2025, the department published MAR Notice No. 2025-14.1 pertaining to the proposed amendment of the above-stated rules in the 2025 Montana Administrative Register, Issue Number 5. No public hearing was scheduled or requested.

Final Rulemaking Action – Effective April 26, 2025

AMEND AS PROPOSED

The agency has amended the following rules as proposed:

38.3.405 COMPLETION OF PROTEST TO APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

38.3.406 COMPLETION OF PROTEST TO APPLICATION FOR CERTIFICATE OF COMPLIANCE

Statement of Reasons

No comments were received.

Contact

Department of Public Service Regulation
(800) 646-6150
pschelp@mt.gov

Rule Reviewer

Amanda S. Webster

Approval

Brad Molnar, President, Public Service Commission



FISH, WILDLIFE AND PARKS

NOTICE OF ADOPTION OF EMERGENCY RULE

MAR NOTICE NO. 2025-135.1

Summary

Adoption of an emergency rule closing the Cornell Park Fishing Access Site on the Beaverhead River in Beaverhead County

Reason

The Department of Fish, Wildlife and Parks (department) has determined the following reasons justify the adoption of an emergency rule:

(1) The Cornell Park Fishing Access Site closure is to facilitate construction of a new boat ramp and streambank restoration work.

(2) The combination of dangerous conditions includes heavy equipment being used throughout much of the site regarding construction of a new boat ramp and streambank restoration, ultimately rendering unsafe conditions for pedestrian and vehicle travel. The entire site will remain closed until construction is complete.

(3) The closure will remain in place until construction is complete and the site is safe for the public to recreate there. Persons recreating at the fishing access site may be at risk of unsafe roadways and injury.

(4) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, due to the combination of unsafe conditions and this threat cannot be averted or remedied by any other administrative act, the department adopts the following emergency rule. This emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties and published as an emergency rule in Issue No. 8 of the 2025 Montana Administrative Register.

Effective Date

Wednesday, April 16, 2025

Accommodations

The agency will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. Requests must be made by Wednesday, April 30, 2025 at 5:00 p.m.

Contact

Kara Thompson
406-594-8071
Kara.Thompson@mt.gov

ADOPT

The agency is adopting:

RULE 1 EMERGENCY CLOSURE OF THE CORNELL PARK FISHING ACCESS SITE

- (1) The Cornell Park Fishing Access Site is located in Beaverhead County.
- (2) The Cornell Park Fishing Access Site is closed to pedestrian and motorized vehicle use.
- (3) This rule will expire as soon as construction is complete and no longer present a risk to public health and safety. Signs closing the Cornell Park Fishing Access Site will be removed when the rule is no longer effective.

Authorizing statute(s): 2-4-303, 87-1-202, MCA

Implementing statute(s): 2-4-303, 87-1-202, MCA

Interested Persons

The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department, commission or board. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing or email address of the person to receive the notice. Written requests may be mailed or delivered to the Department of Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be completed online at <https://public.govdelivery.com/accounts/MTFWP/subscriber/new>.

Bill Sponsor Notification

The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Committee Notification

The special notice requirements of 2-4-303, MCA have been met. All committee members and staff of the Environmental Quality Council, with addresses provided on the Montana Legislature's website (leg.mt.gov), were contacted by e-mail on Tuesday, April 15, 2025.

Rule Reviewer

Jaime MacNaughton

Approval

Christy Clark, Director



FISH, WILDLIFE AND PARKS

NOTICE OF ADOPTION OF EMERGENCY RULE

MAR NOTICE NO. 2025-141.1

Summary

Adoption of an emergency rule partially closing the Poindexter Slough Fishing Access Site on the Beaverhead River in Beaverhead County

Reason

The Department of Fish, Wildlife and Parks (department) has determined the following reasons justify the adoption of an emergency rule:

(1) The Poindexter Slough Fishing Access Site will be partially closed to facilitate willow harvesting as part of streambank restoration work being done at the Cornell Park Fishing Access Site.

(2) The combination of dangerous conditions includes heavy equipment being on site rendering unsafe conditions for pedestrian and vehicle travel. The east parking lot and portion of the Poindexter Slough FAS north of Highway 222 and east of the railroad tracks will be closed while heavy equipment is on the site. The site will be partially closed until restoration is complete.

(3) The partial closure will remain in place from Monday April 21 through Thursday April 24, 2025. The duration of the closure is subject to change if unexpected delays arise and until restoration work is complete and the site is safe for the public to recreate there. Persons recreating at the fishing access site may be at risk of unsafe roadways and injury.

(4) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, due to the combination of unsafe conditions and this threat cannot be averted or remedied by any other administrative act, the department adopts the following emergency rule. This emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties and published as an emergency rule in Issue No. 8 of the 2025 Montana Administrative Register.

Effective Date

Tuesday, April 15, 2025

Accommodations

The agency will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. Requests must be made by Friday, May 2, 2025 at 5:00 p.m.

Contact

Audrey J. Kelly
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Audrey.Kelly@mt.gov

ADOPT

The agency is adopting:

RULE 1 EMERGENCY PARTIAL CLOSURE OF THE POINDEXTER SLOUGH FISHING ACCESS SITE

- (1) The Poindexter Slough Fishing Access Site is located in Beaverhead County.
- (2) The eastern portion of Poindexter Slough Fishing Access Site is closed to pedestrian and motorized vehicle use.
- (3) This rule will expire as soon as restoration work is complete and no longer present a risk to public health and safety. Signs partially closing the Poindexter Slough Fishing Access Site will be removed when the rule is no longer effective.

Authorizing statute(s): 2-4-303, 87-1-202, MCA

Implementing statute(s): 2-4-303, 87-1-202, MCA

Interested Persons

The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department, commission or board. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing or email address of the person to receive the notice. Written requests may be mailed or delivered to the Department of Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be completed online at <https://public.govdelivery.com/accounts/MTFWP/subscriber/new>.

Bill Sponsor Notification

The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Committee Notification

The special notice requirements of 2-4-303, MCA have been met. All committee members and staff of the Environmental Quality Council, with addresses provided on the Montana Legislature's website (leg.mt.gov), were contacted by e-mail on Monday, April 14, 2025.

Rule Reviewer

Jaime MacNaughton

Approval

Christy Clark, Director



FISH, WILDLIFE AND PARKS

NOTICE OF ADOPTION OF EMERGENCY RULE

MAR NOTICE NO. 2025-142.1

Summary

Adoption of an Emergency Rule Closing Cabbage Gulch Road Off Highway 569 South of Anaconda in Deer Lodge County

Reason

The Department of Fish, Wildlife and Parks (department) has determined the following reasons justify the adoption of an emergency rule:

- (1) Cabbage Gulch Road off Highway 569 south of Anaconda will be closed for road maintenance and public safety improvements.
- (2) The combination of dangerous conditions includes heavy equipment being on the road rendering unsafe conditions for pedestrian and vehicle travel. Cabbage Gulch Road is one of the entrances to the Mount Haggin Wildlife Management Area. Mount Haggin WMA's seasonal closure for wintering wildlife remains in effect. Portions of the WMA east of the Continental Divide are closed until noon on May 15, 2025, and areas east of the divide are open year round.
- (3) The closure will remain in place from Monday April 21 through Wednesday April 23, 2025. The closure is in effect until maintenance is complete and the road is safe for the public to use. Persons recreating in the area may be at risk of unsafe roadways and injury.
- (4) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, due to the combination of unsafe conditions and this threat cannot be averted or remedied by any other administrative act, the department adopts the following emergency rule. This emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties and published as an emergency rule in Issue No. 8 of the 2025 Montana Administrative Register.

Effective Date

Tuesday, April 15, 2025

Accommodations

The agency will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. Requests must be made by Friday, May 2, 2025 at 5:00 p.m.

Contact

Audrey J. Kelly
(406) 594-8073
Audrey.Kelly@mt.gov

ADOPT

The agency is adopting:

RULE 1 EMERGENCY CLOSURE OF CABBAGE GULCH ROAD OFF HIGHWAY 569 SOUTH OF ANACONDA

- (1) Cabbage Gulch Road off Highway 569 south of Anaconda is located in Deer Lodge County.
- (2) Cabbage Gulch Road off Highway 569 south of Anaconda is closed to pedestrian and motorized vehicle use.
- (3) This rule will expire as soon as road maintenance and public safety improvement work is complete and no longer present a risk to public health and safety. Signs closing Cabbage Gulch Road off Highway 569 south of Anaconda will be removed when the rule is no longer effective.

Authorizing statute(s): 2-4-303, 87-1-202, MCA

Implementing statute(s): 2-4-303, 87-1-202, MCA

Interested Persons

The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department, commission or board. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing or email address of the person to receive the notice. Written requests may be mailed or delivered to the Department of Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be completed online at <https://public.govdelivery.com/accounts/MTFWP/subscriber/new>.

Bill Sponsor Notification

The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Committee Notification

The special notice requirements of 2-4-303, MCA have been met. All committee members and staff of the Environmental Quality Council, with addresses provided on the Montana Legislature's website (leg.mt.gov), were contacted by e-mail on Monday, April 14, 2025.

Rule Reviewer

Jaime MacNaughton

Approval

Christy Clark, Director



OFFICE OF THE GOVERNOR

VACANCIES AND APPOINTMENTS

APRIL 2025

UPCOMING VACANCIES – MAY 2025

- None

https://governor.mt.gov/boards_appointments/

RECENT APPOINTMENTS – MARCH 2025

- **Board of Aeronautics**
 - Wade Cebulski
 - 3/3/25 - 1/3/29
 - Predecessor: Reappointed
 - Qualification: Montana Pilot's Association Member
 - Tim Damrow
 - 3/3/25 - 1/3/29
 - Predecessor: Chamberlin
 - Qualification: Airport Management Association Member
 - Tim Robertson
 - 3/3/25 - 1/3/29
 - Predecessor: Reappointed
 - Qualification: Montana Association of Counties Member
 - Gregory A. Smith
 - 3/3/25 - 1/3/29
 - Predecessor: Reappointed
 - Qualification: Aerial Applicators Member
 - Grayson Sperry
 - 3/3/25 - 1/3/29
 - Predecessor: Reappointed
 - Qualification: Chamber of Commerce Member

- **Livestock Loss Board**
 - Joseph Kipp
 - 3/6/25 - 1/2/29
 - Predecessor: Reappointed
 - Qualification: Public Member with knowledge and experience with wildlife impacts or management
 - Doreen Gillespie
 - 3/6/25 - 1/2/29
 - Predecessor: Reappointed
 - Qualification: Public Member with knowledge and experience with wildlife impacts or management
 - Jordan Mannix
 - 3/6/25 - 1/2/29
 - Predecessor: Allestad
 - Qualification: Public Member with knowledge and experience with wildlife impacts or management
- **Board of Milk Control**
 - Ken Bryan
 - 3/6/25 - 1/1/27
 - Predecessor: Reappointed
 - Qualification: Not connected to the industry and not a public officer - Republican
 - William Mitchell
 - 3/6/25 - 1/1/27
 - Predecessor: Scott Mitchell
 - Qualification: Attorney - Not connected to the industry and not a public officer - Democrat
 - Brian Beerman
 - 3/6/25 - 1/2/29
 - Predecessor: Reappointed
 - Qualification: Not connected to the industry and not a public officer - Republican
 - Staci Ketchum
 - 3/6/25 - 1/2/29
 - Predecessor: Reappointed
 - Qualification: Not connected to the industry and not a public officer - Republican
 - Travis Stroh
 - 3/6/25 - 1/2/29
 - Predecessor: Reappointed
 - Qualification: Not connected to the industry and not a public officer - Independent

- **Board of Personnel Appeals**
 - Kerry Davant
 - 3/31/25 - 1/2/29
 - Predecessor: Reappointed
 - Qualification: General labor-management experience
 - Julie Smith
 - 3/31/25 - 1/11/27
 - Predecessor: McRae
 - Qualification: Management employee in organization with collective bargaining or who represents management in collective bargaining
 - Jenny Stringer
 - 3/31/25 - 1/2/29
 - Predecessor: Reappointed
 - Qualification: Management employee in organization with collective bargaining or who represents management in collective bargaining
- **Burial Preservation Board**
 - Wallace Bearchum
 - 3/18/25 - 9/1/25
 - Predecessor: Fisher
 - Qualification: Northern Cheyenne Tribe Representative
 - Gheri Hall
 - 3/18/25 - 9/1/27
 - Predecessor: Murray
 - Qualification: Blackfeet Nation Tribe Representative
- **Board of Livestock**
 - Jake Feddes
 - 3/18/25 - 3/31/31
 - Predecessor: Reappointed
 - Qualification: Cattle producer
 - Greg Wichman
 - 3/18/25 - 3/31/31
 - Predecessor: Reappointed
 - Qualification: Sheep Producer/Rancher